90-1047

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NATIONAL AMUSEMENTS, INC.,
Petitioner,

v.

CITY OF SPRINGDALE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

Charles G. Atkins,
Counsel of Record
Larry A. Temin
Shawn M. Young
STRAUSS & TROY
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202-4186
(513) 621-2120

Attorneys for Petitioner,
National Amusements, Inc.

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTION PRESENTED FOR REVIEW

May A State Court, On The Basis of *Res Judicata*, Forever Foreclose Review Of The Merits Of A Federal Constitutional Challenge To A Municipal Ordinance That Differentially Taxes A First Amendment-Protected Activity, Where There Has Been An Intervening, Controlling Change In The Applicable Constitutional Law Pronounced By This Court?

PARTIES

PETITIONER

(Plaintiff-Appellant in the Supreme Court of Ohio):

1. National Amusements, Inc.*

RESPONDENTS

(Defendants-Appellees in the Supreme Court of Ohio):

1. City of Springdale

2. Doyle H. Webster, Clerk-Treasurer of City of Springdale

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* Petitioner National Amusements, Inc. has an ownership interest in the following non-wholly owned subsidiaries:
Natick Auto Theatre Corporation
Viacom, Inc.
WMS Industries, Inc.

Sup. Ct. Rule 29.1.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, National Amusements, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio.

OPINIONS BELOW

The August 8, 1990 opinion delivered by the Supreme Court of Ohio is reported at 53 Ohio St. 3d 60, 558 N.E.2d 1178 (1990) and appears in the Appendix beginning at page 6a. The unreported decision filed May 10, 1989 by the First Appellate District of Ohio Court of Appeals, reversing the judgment of the trial court and entering final judgment for

Respondents, is reproduced in the Appendix beginning at page 22a. The unreported opinion on the merits filed by the Hamilton County Court of Common Pleas on June 3, 1987 and the amended entry of judgment entered June 29, 1987 by the trial court on that opinion are reproduced in the Appendix beginning at page 39a. The unreported opinion filed by the trial court on January 29, 1985 and the entry filed by the trial court on February 8, 1985, upon Respondents' motion for summary judgment, sustaining in part and overruling in part the motion, are reproduced in the Appendix beginning at page 51a.

The November 18, 1981 opinion delivered by the First Appellate District of Ohio Court of Appeals is reported at 3 Ohio App. 3d 70, 443 N.E.2d 1016 and appears in the Appendix beginning at page 60a.

JURISDICTION

Petitioner seeks review of the judgment entered August 8, 1990 by the Supreme Court of Ohio on the opinion issued that day by that court and, also, on the October 3, 1990 rehearing entry issued in response to the motion for rehearing filed by Petitioner in the Supreme Court of Ohio on August 20, 1990. This petition is filed within 90 days of the rehearing entry. 28 U.S.C. § 2101(c); Sup. Ct. R. 13.4. This Court has jurisdiction to review said judgment pursuant to 28 U.S.C. Section 1257(a). This case involves the following provisions of the Constitution of the United States and municipal ordinances:

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT I

> Congress shall make no law respecting an establishment of religion, or prohibiting the full exercise

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assembly, and to petition the Government for a redress of grievances.

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHAPTERS 97 AND 98 OF CODIFIED ORDINANCES OF THE CITY OF SPRINGDALE, OHIO.

Found in the Appendix beginning at page 69a.

STATEMENT OF THE CASE

Statement of the Facts

Petitioner National Amusements, Inc. ("National Amusements") owns and operates the Showcase Cinemas located in the City of Springdale, Ohio. On November 15, 1978 the Springdale City Council passed Ordinance No. 67-1978 (the "Ordinance") enacting Chapter 97 of its codified ordinances, which levied a special 3% admission tax effective January 1, 1979 exclusively "on the amounts received for admission to any cinema in the City" (the "Cinema Admission Tax"). (Appendix at pp. 69a-80a.) The Ordinance did not impose the admission tax on any other place of business, amusement or recreation within the City. (*Id.*)

On December 26, 1978, National Amusements filed a Complaint against the City of Springdale and Doyle H. Webster, City Clerk/Treasurer (hereinafter collectively referred to as the "City") in the Hamilton County Court of Common Pleas, alleging that the Ordinance was facially unconstitutional on due process and equal protection grounds. (Appendix at pp. 65a-68a.) The trial court, on the City's motion for summary judgment, based only upon the pleadings, ruled that the Ordinance was constitutional on its face. (Appendix at p. 64a.) The court of appeals upheld that determination, emphasizing that the sole question raised by the Complaint and presented on appeal was whether the Ordinance was facially invalid on equal protection grounds (Appendix at p. 61a.) The court of appeals noted there was no claim of discriminatory application, and that no factual issues were presented to the trial court. (*Id.*, n.1).

Proceedings Below

On July 10, 1984 National Amusements filed this case, challenging the constitutionality of the Ordinance as applied, and on January 9, 1985 Petitioner filed its Amended Complaint, which alleges that the Cinema Admission Tax, by ex-

clusively taxing the admission price to cinemas and no other place of business, entertainment or recreation within the City, constitutes impermissible differential taxation of a First Amendment-protected activity in violation of the First and Fourteenth Amendments to the United States Constitution and in violation of the Ohio Constitution. (Appendix at pp. 56a-59a.) The Amended Complaint also asks that the City be required to remit to Petitioner all taxes it has paid to date under the Ordinance. The new First Amendment claim was based upon the intervening decision of this Court in *Minneapolis Star and Tribune Company* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). *Minneapolis Star* was a significant development and change in the law and accorded Petitioner its present cause of action.

On October 1, 1984, three months after the filing of National Amusements' Complaint in this case, the City enacted a new and separate "Entertainment Admission Tax," levying a tax on the admission price to enter the premises of any establishment where any entertainment is performed. (Appendix at pp. 81a-90a.) The Entertainment Admission Tax exempts cinemas from its operation. During the first two years that this separate tax was in effect, the only business subject to it paid a total tax of approximately $115.00. During the period 1979 to 1984 under the Cinema Admission Tax, National Amusements paid over $500,000.00 (Appendix at p. 43a.)

The City filed a motion for summary judgment against the Amended Complaint on the grounds of *res judicata* (claiming the judgment in the initial case to be a bar to this action) and also contending that the Cinema Admission Tax was unconstitutional as a matter of law. The trial court denied the City's motion on the *res judicata* defense and also with respect to the constitutionality of the tax from January 1, 1979, its effective date, to October 1, 1984. (Appendix at p. 55a.) It sustained the motion with respect to the constitutionality of the tax after October 1, 1984, the date of the enactment of the separate Entertainment Admission Tax, holding that the

enactment of that separate taxing ordinance cured any earlier constitutional infirmity of the Cinema Admission Tax. (*Id.*)

Following a trial on the merits, the trial court held, by Amended Judgment Entry of June 29, 1987, that the Cinema Admission Tax was differentially applied to National Amusements to the exclusion of all other similar businesses, and that it violated National Amusements' right to equitable taxation and unfairly burdened the exercise of its First Amendment rights for the period from January 1, 1979 until October 1, 1984. (Appendix at p. 39a.) The trial court awarded Petitioner damages in the sum of $535,139.14, the amount of tax paid under protest by National Amusements betweeen November 15, 1978 and October 1, 1984, plus $258,695.00, the amount proved by National Amusements as out-of-pocket consequential damages for the cost it paid on the money it borrowed to pay the tax. *Id.*

The City appealed the decision of the trial court, raising three assignments of error. (Appendix at pp. 35a-38a.) The first of these asserted, in substance, that the court erred by finding that the earlier judgment was not *res judicata* in bar of the present action. (*Id.* at p. 36a.) The second assignment of error contested the trial court's finding that the Ordinance was unconstitutional as to the period from November 15, 1978 to October 1, 1984 (*Id.* at p. 37a), and the third assignment of error contended that the City could not be liable for damages that it claimed were in the nature of interest on the taxes collected under the unconstitutional Ordinance. (*Id.* at p. 38a.)

National Amusements cross-appealed, asserting the single assignment of error that the trial court erred in granting Respondents' motion for summary judgment finding the Cinema Admission Tax, as applied, constitutionally valid after October 1, 1984. (Appendix at pp. 29a-34a.)

The court of appeals in its decision of May 10, 1989 affirmed the trial court's holding as to Petitioner's cross-appeal and sustained Respondents' three assignments of error, revers-

ing the judgment and entering final judgment for Respondents. (Appendix at pp. 22a-28a.) National Amusements timely appealed from that decision to the Supreme Court of Ohio.

Petitioner's appeal to the Supreme Court of Ohio set forth six separate propositions of law. (Appendix at pp. 12a-19a.) The first and second of these concerned the holding of the court of appeals on the *res judicata* issue. The first asserted that, even if the causes of action in the two cases were in fact the same, the doctrine of *res judicata* cannot prevent reconsideration of the constitutionality of the Ordinance made necessary by the intervening change in the law, in order to avoid inequitable and unconstitutional administration of the laws. (*Id.* at p. 13a.) The second proposition of law contended that the causes of action in the first and second suits were not the same and, therefore, the judgment in the first suit did not bar the second action. (*Id.* at p. 15a.)

The third, fourth, and fifth propositions of law dealt with the merits of the constitutional challenge to the Ordinance. The third proposition reiterated the standard set forth by this Court in *Minneapolis Star* for testing the constitutional validity of a tax, to wit: a tax that differentially burdens and singles out a First Amendment-protected activity cannot stand unless necessary to achieve a compelling governmental interest that cannot be achieved by other means. (*Id.* at p. 16a.) The fourth proposition of law contended that the City of Springdale's declared purpose for the imposition of the Cinema Admission Tax, its desire to raise revenue for general municipal operations and capital improvements, does not constitute the required compelling governmental interest. (*Id.* at p. 17a.) The fifth proposition of law asserted that the later enactment by the City of a separate Entertainment Admission Tax did not cure the unconstitutionality of the Cinema Admission Tax. (*Id.* at p. 18a.)

Lastly, the sixth proposition of law contested the court of appeals' holding reversing that portion of the award of

damages to Petitioner measured as the interest it paid on money it borrowed to pay the challenged Cinema Admission Tax. (*Id.*)

The Supreme Court of Ohio in its decision of August 8, 1990 affirmed the judgment of the court of appeals, holding that the case was barred by the doctrine of *res judicata*. (Appendix at pp. 6a-11a.) The court disposed of the case on the basis of Petitioner's first and second propositions of law, and purported not to reach the underlying issue of the constitutionality of the Cinema Admission Tax.[1]

On August 20, 1990 National Amusements timely filed a Motion for Rehearing on the grounds that the court misapplied the judicial doctrine of *res judicata* to bar Petitioner's claim when presented with this Court's intervening decision in *Minneapolis Star*, and that in determining that the causes of action in the first suit and the instant suit to be the same, the court had failed to give effect to the different tax years at issue in this suit as opposed to the former suit. (Appendix at pp. 2a-3a.) The court issued its Rehearing Entry on October 3, 1990 denying Petitioner's motion. (*Id.* at p. 1a.)

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[1] In a footnote to the decision, the court strongly suggested that Petitioner's constitutional claim might not be meritorious, based upon the court's belief that the facts of the case were "significantly different from those in *Minneapolis Star*," 52 Ohio St. 3d at 64, n.3; 558 N.E.2d at 1181, n.3.

REASONS FOR GRANTING THE WRIT

This Court Has Jurisdiction To Hear This Case Because A State Court May Not, On The Basis Of *Res Judicata*, Forever Foreclose Review Of The Merits Of A Federal Constitutional Challenge To A Municipal Ordinance That Differentially Taxes A First Amendment-Protected Activity, Where There Has Been An Intervening, Controlling Change In The Applicable Constitutional Law Pronounced By This Court.

I. INTRODUCTION

This Court has jurisdiction to issue a writ of certiorari because Petitioner's claim, under the First Amendment of the United States Constitution, challenges the validity of a municipal ordinance of the City of Springdale, Ohio that singles out and differentially taxes admissions to cinemas in that City. *Minneapolis Star and Tribune Co.* v. *Minneapolis Commissioner of Revenue*, 460 U.S. 575 (1983), declares that taxing legislation, such as that here being challenged, is constitutionally infirm because it singles out and differentially taxes a First Amendment-protected activity. The trial court found in favor of Petitioner on the merits, but the court of appeals reversed on the ground of *res judicata*. By way of dictum, the court of appeals reiterated its holding in the first case and declared the challenged Cinema Admission Tax to be constitutionally valid. On Petitioner's appeal to the Supreme Court of Ohio, that court disposed of the case on the ground of *res judicata*, without reaching the merits of the federal constitutional question, holding that the doctrine of *res judicata* barred Petitioner's claim.

Where a federal ground is properly asserted and denied or not given due recognition by the state court, it is incumbent upon this Court, in order that constitutional guarantees may appropriately be enforced, to ascertain for itself whether an asserted nonfederal ground independently and adequately supports the judgment. *Abie State Bank* v. *Bryan*, 282 U.S.

765, 773 (1931). *See also NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449 (1958); *Angel* v. *Bullington*, 330 U.S. 183, 189 (1947); *Enterprise Irrig. Dist.* v. *Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917).

Petitioner recognizes where this Court has determined there are independent and adequate state grounds to support a decision, it will not review state court judgments that deny a claim of a federal right. *See Henry* v. *Mississippi*, 379 U.S. 443 (1965). But, the independence and adequacy of a state ground is itself a federal question to be determined by this Court. *See Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965). In *Broad River Power Co.* v. *State of South Carolina ex. rel. Daniel*, 281 U.S. 537 (1930) this Court stated: "Whether the state court has denied to rights asserted under local law the protection which the Constitution guarantees is a question upon which the petitioners are entitled to invoke the judgment of this court." *Id.* at 540. *See also Love* v. *Griffith*, 266 U.S. 32, 33-34 (1924); *Ward* v. *Love County*, 253 U.S. 17, 22 (1920).

It is settled law that a state court may not avoid deciding federal questions and thus defeat the jurisdiction of this Court by putting forward nonfederal grounds of decision which are without fair or substantial support. *Wolfe* v. *North Carolina*, 364 U.S. 177, 185 (1960); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 455 (1958). In *Ward* v. *Love County*, 253 U.S. 17 (1920), this Court stated:

> Whether the [federal] right was denied, or not given due recognition [by the state appellate court], is a question as to which the claimants were entitled to invoke our judgment, and this they have done in the appropriate way. It therefore is within our province to inquire . . . whether [the federal right] was denied in substance and effect. . . . [I]t is true that a judgment of a state court, which is put on independent non-Federal grounds broad enough to sustain it, cannot be reviewed by us. But the qualification is a material

> one, and cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution. . . .

Id. at 22, 23. Similarly, in *Broad River Power Co.* v. *State of South Carolina*, 281 U.S. 537 (1930), this Court stated: "Even though the constitutional protection be denied on nonfederal grounds, it is the province of this court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded."

This Court thus has jurisdiction to review the decision of the Supreme Court of Ohio, which was purportedly based on state grounds, because the state's application of *res judicata* is not of such a substantial basis as to preclude this Court's review of the merits of the First Amendment constitutional issue engendered by an intervening change in the law relied upon by Petitioner.

II. THE BASIS ASSERTED BY THE STATE COURT IS NOT ADEQUATE TO PRECLUDE REVIEW BY THIS COURT

A. The State Court's Application of the Doctrine of *Res Judicata* Impermissibly Deprives Petitioner of a Reasonable Opportunity To Assert First Amendment Rights.

Petitioner's first suit was filed in 1978, after the Ordinance was first passed, but before its effective date. The first suit sought only a declaration that the Ordinance was facially invalid on equal protection grounds. No taxes had been paid under the Ordinance (or even assessed) as of that date, and the suit, therefore, did not seek return of any taxes. Petitioner's claim in the first case was disposed of by summary judgment, on the basis of the pleadings and, by agreement, without other factual documentation. The court of appeals in that case phrased the inquiry presented as whether the Ordinance makes an invalid classification because it arbitrarily singles out only cinema admissions for taxation. It answered this question in the negative, holding that a taxing authority may discriminate "between trades and activities" provided the classification rests "upon some ground of difference having a fair and substantial relation to the object of legislation." 3 Ohio App. 3d at 71. The court held that even if a classification does discriminate between entities subject to taxation, equal protection is not violated "if there exists any state of facts that reasonably can be conceived to constitute a validating distinction from other taxable entities." *Id.* at 71-72. The standard applied by the trial court and the court of appeals in the initial case is that applicable to an equal protection analysis where the exercise of a fundamental federal right is not involved.[2]

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[2] The same analysis was erroneously applied by the court of appeals in the instant case. The court failed to recognize that, because of *Minneapolis Star*, the nature of the inquiry had changed, and the burden to be borne by the City was not the same as that applicable to an equal protection analysis not involving the exercise of a fundamental right.

The Amended Complaint in this case challenges the validity of the Ordinance under the First Amendment, and seeks return of taxes actually paid under it, on the basis of impermissible differential taxation, a challenge made possible by this Court's decision in *Minneapolis Star & Tribune Company* v. *Minneapolis Commissioner of Revenue*, 460 U.S. 575 (1983). In that case, this Court held a tax that burdens rights protected by the First Amendment cannot stand unless necessary to achieve a compelling governmental interest which cannot otherwise be achieved. Under this intervening, newly pronounced, constitutional standard the trial court correctly found the Cinema Admission Tax unconstitutional because the City was unable to prove a compelling governmental interest that it could not otherwise achieve.

At least two other courts, faced with similar challenges to cinema admission taxes under *Minneapolis Star*, have found such taxes to be unconstitutional. *See United Artists Communications, Inc.* v. *City of Montclair*, 209 Cal. App. 3d 245, 257 Cal. Rptr. 124 (1989); *Festival Enterprises, Inc.* v. *City of Pleasant Hill*, 182 Cal. App. 3d 960, 227 Cal. Rptr. 601 (1986). The result of the ruling of the Supreme Court of Ohio is that Petitioner must continue to pay what is, under *Minneapolis Star*, an unconstitutional tax. Others, who have filed or will file claims after *Minneapolis Star*, will not have to pay the unconstitutional tax or similar taxes.[3]

It was observed by Justice Clark in *Williams* v. *Georgia*, 349 U.S. 375 (1955):

> A purported state ground is not independent and adequate in two instances. *First*, where the circumstances give rise to an inference that the state court is guilty of an evasion — an interpretation of state law with spe-

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[3] At least one such suit is currently pending in Ohio, *i.e.*, *Tri-County Cinemas, Inc.* v. *City of Springdale*, Hamilton County Court of Common Pleas Case No. A8707374, which challenges the same Ordinance that is challenged in Petitioner's suit, and which alleges the constitutional basis pronounced in *Minneapolis Star*.

> cific intent to deprive a litigant of a federal right. *Second*, where the state law, honestly applied though it may be, dictated by the precedents, throws such obstacles in the way of enforcement of federal rights that it must be struck down as unreasonably interfering with the vindication of such rights (emphasis in original).

Id. at 399 (Clark, J., dissenting) (citing *Davis* v. *Wechsler*, 263 U.S. 22 (1923) and *Iowa-Des Moines Nat'l Bank* v. *Bennett*, 284 U.S. 239, 247 (1931)). A state court may not refuse a reasonable opportunity for hearing a federal claim where the result is to deny an effective remedy to the plaintiff. *See, e.g.*, *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239 (1931) (state must provide a remedy for recovery when unequal tax has been collected). In *General Oil Co.* v. *Crain*, 209 U.S. 211 (1908), the state denied the plaintiff a remedy as a result of a Tennessee statute which denied the jurisdiction of state courts to hear actions intended to reach the treasury, funds, or property of the state. This Court reasoned that, because a party has the right to be protected against a law that violates constitutional rights, "a decision which denies such protection gives effect to the law, and the decision is reviewable by this court." *Id.* at 228.

A state's procedural grounds for disregarding claims cannot be found adequate if they fall below the requirements of due process. 16 Wright & Miller, *Federal Practice & Procedure*, § 4025 (1977). The principle that a nonfederal ground for decision is not adequate to support a judgment where it deprives the party of due process has been applied in tax cases. *See, e.g.*, *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930) (suit to enjoin county from collecting taxes alleged to have been assessed in violation of equal protection clause); *Saunders* v. *Shaw*, 244 U.S. 317 (1917) (suit to enjoin collection of drainage tax). This Court has held that *res judicata* is not an adequate support for a judgment when "the decision reached upon it is so clearly ill-founded

that it cannot sustain the judgment; and this for the reason that it is inconsistent with another Federal right of [petitioner], fundamental in character." *Postal Telegraph-Cable Co.* v. *City of Newport*, 247 U.S. 464, 475-76 (1918) (petitioner had been deprived of the fundamental constitutional right of due process).

The result of the rule applied by the Supreme Court of Ohio here (even if it does not amount to a denial of due process) is that Petitioner is precluded from a reasonable opportunity to assert its federal claim. As Justice Holmes stated in *Davis* v. *Wechsler*, 263 U.S. 22 (1923), "the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Id.* at 24. The effect of the ruling of the Supreme Court of Ohio here is to do just that.

This Court previously has determined collateral estoppel cannot bar a constitutional challenge where there has been an intervening, controlling change in the law. In *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984), *vacating Hooven & Allison Co.* v. *Lindley*, 4 Ohio St. 3d 169, 447 N.E.2d 1295 (1983), the Ohio Board of Tax Appeals had reversed a tax assessment on the ground that an earlier decision of this Court involving the same parties and the same goods (*Hooven I*) had determined the goods to be exempt from taxation, and collateral estoppel thus prevented taxing the goods. The Ohio Supreme Court affirmed, refusing to address the constitutional issue based on its ruling that collateral estoppel prohibited the tax commissioner from taxing the goods. 4 Ohio St. 3d at 173. The court acknowledged the existence of the intervening case of *Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976), which the Tax Commissioner argued had "so altered the legal atmosphere relative to the constitutionality of personal property taxation of imports as to eviscerate Hooven's estoppel claim." 4 Ohio St. 3d at 171-72; 447 N.E.2d at 1297. The court rejected the Commissioner's argument, however, because *Hooven I* had not been expressly overruled in *Michelin*. *Id.* at 1297-98. This Court reversed, holding that

although *Hooven I* had not been expressly overruled by *Michelin*, it was inconsistent with that case which adopted "a fundamentally different approach." 466 U.S. at 359. This Court found that collateral estoppel could not be applied because the constitutional analysis of *Hooven I* had been "*repudiated* by this Court's intervening pronouncement." *Id.* at 362 (emphasis in original). This Court further stated:

> Because the Supreme Court of Ohio did not apply the principles of Sunnen, [*Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591 (1948)], its judgment must be vacated and the case remanded. Failure to follow Sunnen's dictates would lead to the very tax inequality that the admonition of that case was designed to avoid. Hooven then would be immune forever from tax on its imported goods because of an early decision based upon a now repudiated legal doctrine, while all other taxpayers would have their tax liabilities determined upon the basis of the fundamentally different approach adopted in *Michelin*.

466 U.S. at 363.

In *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591 (1948), a federal income tax case, this Court discussed the subject at length, saying in part:

> If the legal matters determined in the earlier case differ from those raised in the second case, collateral estoppel has no bearing on the situation. [Citation omitted.] And where the situation is vitally altered between the time of the first judgment and the second, the prior determination is not conclusive. *See State Farm Mut. Auto. Ins. Co.* v. *Duel*, 324 U.S. 154, 162, 89 L.Ed 812, 818, 65 S. Ct. 573; 2 Freeman, Judgments 5th Ed. (1925) § 713. As demonstrated by *Blair* v. *Commissioner*, 300 U.S. 5, 9, 81 L.Ed. 465, 469, 57 S. Ct. 330, a judicial declaration intervening between the two proceedings may so change the legal

> atmosphere as to render the rule of collateral estoppel inapplicable.

333 U.S. at 599-600 (footnote omitted). *See also Montana* v. *United States*, 400 U.S. 147, 161-63 (1979).

To forever foreclose Petitioner from challenging the constitutionality of the Cinema Admission Tax, to prevent Petitioner from seeking a return of taxes paid for all past tax years, and to require Petitioner to pay all future unconstitutionally levied taxes is a denial of due process. The anomalous result impermissibly treats Petitioner differently and denies the very constitutional rights that protect other taxpayers who have successfully challenged similar cinema admission taxes and who will successfully challenge this Cinema Admission Tax. Clearly, such a rule does not afford Petitioner a reasonable opportunity to assert its federal rights, and denies Petitioner a remedy for what is, under *Minneapolis Star*, a constitutionally infirm tax. As this Court stated in *Lawrence* v. *Tax Commission of Mississippi*, 286 U.S. 276 (1932):

> If the Constitution exacts a uniform application of this tax on appellant and his competitors, his constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it [citation omitted], for in either case the inequality complained of is left undisturbed by the state court whose jurisdiction to remove it was rightly invoked.

Id. at 282.

B. The Decision Of The Supreme Court of Ohio Is Inconsistent With And Not Supported By Prior Ohio Law And Its Effect Is To Evade The Federal Constitutional Issue.

Where the highest court of a state decides a case involving a federal question solely upon a nonfederal ground, this Court has consistently exercised its jurisdiction where the effect of

the preclusive application of the nonfederal ground is to evade review of the underlying federal question. In *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.*, 243 U.S. 157 (1917), this Court stated:

> But where the nonfederal ground is so interwoven with the other as not to be an independent matter, or is not of sufficient breadth to sustain the judgment without any decision of the other, our jurisdiction is plain. [citations omitted] And this is true also where the nonfederal ground is so certainly unfounded that it properly may be regarded as essentially arbitrary, or a mere device to prevent a review of the decision upon the Federal question.

243 U.S. at 164. *See also Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 129 (1945); *McCoy* v. *Shaw*, 277 U.S. 302, 303 (1928); *Vandalia R.R. Co.* v. *Indiana ex rel. South Bend*, 207 U.S. 359, 367 (1907); *Rogers* v. *Alabama*, 192 U.S. 226, 231 (1904).

The holding of the Supreme Court of Ohio in the case at bar is that:

> Generally, a change in decisional law which might arguably reverse the outcome in a prior civil action does not bar the application of the doctrine of *res judicata*. Since the doctrine of *res judicata* serves important public and private interests, exceptions to the doctrine's application should be narrowly construed. (*LaBarbera* v. *Batsch* (1967), 10 Ohio St. 2d 106, 39 O.O. 2d 103, 227 N.E.2d 55; *Berkey Farmers' Mut. Tel. Co.* v. *Sylvania Home Tel. Co.* (1917), 97 Ohio St. 67, 119 N.E. 140; *Michael* v. *American Natl. Bank* (1911), 84 Ohio State 370, 95 N.E. 905, approved and followed.)

(Syllabus). The cases cited in the syllabus by the Supreme Court of Ohio are all cases in which no federal constitutional issue was involved. The body of the decision discussed no

prior Ohio case discussing *res judicata* or collateral estoppel in the context of a federal constitutional issue. Rather, the court simply stated that "the general rule" applies to changes of constitutional law, citing for support a case from New York State.[4] 53 Ohio St. 3d at 63. The court noted that some courts "have recognized an exception to the doctrine of *res judicata* where there has been a 'major change in constitutional principles as applied in areas of continuing conduct * * *' ", *id.* at 63, but disposed of this by stating that "[t]hough broadly worded, this exception is actually quite narrow, having been applied almost exclusively to school desegregation cases." *Id.* (citing cases).[5]

The court wholly ignored its decision in *Hooven & Allison Co.* v. *Lindley*, 4 Ohio St. 3d 169, 447 N.E.2d 1295 (1983), *vacated*, *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984), in which it had acknowledged that "at least in the context of tax determinations, the applicability of collateral estoppel is not untempered." 4 Ohio St. 3d at 171. In *Hooven*, the Supreme Court of Ohio had also recognized the controlling authority of this Court's holding in *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591 (1948), that a judicial declaration intervening between two proceedings "may so change the legal atmosphere as to render the rule of collateral estoppel inapplicable." 4 Ohio St. 3d at 171

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[4] Although the Supreme Court of Ohio purported to decide the *res judicata* issue as a matter of state law, it is not at all clear that the state law of *res judicata*, as opposed to federal law, should in any event be applied to Petitioner's claim, because the substantive question is a federal constitutional one. *See* discussion in *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353, 361-62 (1984). *See also Montana* v. *United States*, 440 U.S. 147 (1979), where, without discussion, this Court applied federal law to determine the effect of a state court judgment on a federal constitutional claim.

[5] Although the noted exception has, of course, been applied to school desegregation cases, the court's statement that it has been applied almost exclusively in that area is inaccurate. *See* cases discussed *supra*.

(quoting 333 U.S. at 599-600).[6] Here, however, the court refused even to consider whether or not the intervening decision of *Minneapolis Star* had changed the legal climate such that Petitioner's claim must be reconsidered, even if it did present the same cause of action as that in the former suit.[7]

The Supreme Court of Ohio also concluded that the claims asserted in the initial case and in this case constitute the same cause of action. That holding is also inconsistent with prior Ohio law. As noted above, the first case was filed in 1978, after the passage of the Ordinance but before its effective date. The Complaint sought only a declaration that the Ordinance was unconstitutional on equal protection grounds, and did not seek a return of taxes paid, because no taxes had been paid as of that date. The Amended Complaint in this case seeks a declaration of unconstitutionality under the First Amendment and also seeks to recover taxes actually paid under the Ordinance.

As of the date of the filing of the first suit in 1978 National Amusements did not have a cause of action for return of taxes, because it had not been assessed any taxes and had not paid any taxes. Both Ohio state law and federal law are in accord that an action to recover taxes for specified years is not

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[6] Similarly, while the Supreme Court of Ohio has not expressly held that *res judicata* will not act as a bar where there has been an intervening change in the law, the court has in the past recognized that *res judicata* will not act as a bar where there has been a change in the facts that raises a new material issue. *See State* v. *Bacon*, 61 Ohio St. 2d 42, 399 N.E.2d 81 (1980) (¶2 of Syllabus); *Crotty* v. *Cincinnati*, 50 Ohio St. 2d 27, 29, 361 N.E.2d 1340, 1342 (1977).

[7] The court's decision is also arguably inconsistent with its prior decision in *Hooven & Allison Co.* because, in that case, it discussed the issue of collateral estoppel in terms of federal law, whereas in this case the court apparently decided the *res judicata* issue as a matter of state law. This may be explained by the fact that in *Hooven & Allison Co.* the judgment asserted as a bar was, unlike here, a federal court judgment, but the court did not articulate that distinction either in *Hooven & Allison Co.* or in this case.

barred on *res judicata* grounds by an action to recover taxes for a prior year. *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591, 598-99 (1948); *Keokuk & Western R.R. Co.* v. *Missouri*, 152 U.S. 301, 313-16 (1894) ("[a] suit for taxes for one year is no bar to a suit for taxes for another year"); *Standard Oil Co.* v. *Zangerle*, 141 Ohio St. 505, 510, 449 N.E.2d 406, 411 (1943) ("it has generally been held that an action to collect taxes for a given year is not determinative of the rights of the same parties in a later suit between them for collection of taxes on the same property for a subsequent year"); *State* v. *Brotherhood of Railroad Trainmen Ins. Dept.*, 74 Ohio App. 263, 54 N.E.2d 320 (1944) (a judgment in an action to recover franchise taxes for specified years based on a particular statute is not *res judicata* in a subsequent action between the same parties and based on the same statute to recover taxes for different years).

The reason for the rule is sound. *See* 1B J. Moore, J. Lucas, and T. Currier, *Moore's Federal Practice*, § 0.422[1] (1988 and Supp. 1988-89):

> Perpetuation of an erroneous tax decision over a number of years prejudices either the government or the taxpayer and violates the policy of tax uniformity among taxpayers. Moreover, a decision originally correct may, as a result of changed circumstances or changed laws become erroneous in its application to later tax years.

Because different tax years are at issue in this suit and in the former suit, under both Ohio law and federal law the cause of action presented in this case, seeking the return of taxes not paid as of the filing of the first case, is not the same cause of action as presented in the first case. There is thus no basis under Ohio law for holding that the two cases present the same cause of action.

The failure of the Supreme Court of Ohio to consider whether *Minneapolis Star* constitutes a significant change in

the controlling constitutional law, and its application of *res judicata* to different tax years without discussion and contrary to settled Ohio precedent, leads to a justifiable inference that the court's interest was in avoiding the merits of Petitioner's constitutional claim.

III. CONCLUSION

The opinion of the Supreme Court of Ohio, on the basis of *res judicata*, permits the continued differential taxation of Petitioner by permanently foreclosing judicial constitutional reconsideration of the tax, despite an intervening, controlling decision of this Court. If left uncorrected, the decision also mandates as constitutionally permissible the disparate standing among the City's cinemas to challenge the taxation of First Amendment-protected activities. By its dogmatic application of *res judicata*, a doctrine of judicial convenience, the Supreme Court of Ohio perpetuates a taxing system that is, under *Minneapolis Star*, unconstitutional. The further result is, the Ohio courts have encouraged the potential proliferation of additional ordinances throughout the State of Ohio that differentially tax activities protected by the First Amendment. The effect of the decision, allowing the Ordinance to stand, is in direct conflict with the decisions of a sister state holding legislation virtually identical to the Cinema Admission Tax to be an unconstitutional abridgement of the First Amendment. The rationale of the Ohio decision is so constitutionally repugnant, so legally flawed and so utterly without a fair or substantial basis that it does not and must not rise to the level of an independent, adequate nonfederal ground that can preclude review by this Court.

Petitioner respectfully urges tha a writ of certiorari be issued to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

Charles G. Atkins,
Counsel of Record
Larry A. Temin
Shawn M. Young
STRAUSS & TROY
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202-4186
(513) 621-2120

Attorneys for Petitioner,
National Amusements, Inc.

APPENDIX

THE SUPREME COURT OF OHIO
1990 TERM
To wit: October 3, 1990

Case No. 89-1178

NATIONAL AMUSEMENTS, INC.,
Appellant,

v.

CITY OF SPRINGDALE et al.,
Appellees.

REHEARING ENTRY
(Hamilton County)

IT IS ORDERED by the Court that rehearing in this case be, and the same is hereby, denied.
(Court of Appeals Nos. C870627 & C870634)

/s/ THOMAS J. MOYER
Chief Justice

89-1178

IN THE SUPREME COURT OF OHIO

Appeal from the Court of Appeals
First Appellate District,
Hamilton County, Ohio

NATIONAL AMUSEMENTS, INC.,
Plaintiff-Appellant,

v.

CITY OF SPRINGDALE, et al.,
Defendants-Appellees.

MOTION FOR REHEARING
(Filed August 20, 1990)

Charles G. Atkins (No. 0022368)
Larry A. Temin (No. 0022402)
STRAUSS & TROY
2100 Central Trust Center
Cincinnati, Ohio 45202-4186
(513) 621-2120

Attorneys for Plaintiff-Appellant

David A. Caldwell (No. 0000954)
Albert H. Neman (No. 0012272)
2500 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202-2409
(513) 852-6000

Attorneys for Defendants-Appellees

OF COUNSEL:

Wood & Lamping
Kenneth J. Schneider,
Law Director

Plaintiff-Appellant National Amusements, Inc. ("National Amusements") respectfully moves the Court for a rehearing with respect to the Court's August 8, 1990, decision in this matter. The two grounds for this motion are that the Court's decision, holding National Amusements' claim barred by *res judicata*, directly contravenes applicable federal law that requires this Court to consider whether the United States Supreme Court decision of *Minneapolis Star & Tribune Company* v. *Minnesota Commissioner of Revenue* (1983), 460 U.S. 575, was an intervening judicial determination that rendered inapplicable the judicial doctrine of res judicata to National Amusements' cause of action. Further, in determining that the cause of action asserted in the former suit and in this lawsuit are the same, the Court has failed to give effect to the different tax years at issue in this suit as opposed to the former suit. When the former suit was filed, no taxes had yet been assessed or paid under the Ordinance and plaintiff therefore had no cause of action for the return of any such taxes. A cause of action with respect to the taxes later paid did not then exist, and the former action therefore cannot be determinative in this suit. The Memorandum herewith submitted, focuses upon the two propositions of law which the Court addressed in the opinion, but reforming and restating them more fully as the grounds for this motion.

Respectfully submitted,

/s/ Charles G. Atkins (No. 0022368)
Larry A. Temin (No. 0022402)
STRAUSS & TROY
2100 Central Trust Center
Cincinnati, Ohio 45202-4186
(513) 621-2120

Attorneys for Plaintiff-Appellant

THE SUPREME COURT OF OHIO
1990 TERM
To wit: August 8, 1990

Case No. 89-1178

NATIONAL AMUSEMENTS, INC.,
Appellant,

v.

CITY OF SPRINGDALE,
Appellee.

JUDGMENT ENTRY

APPEAL FROM THE COURT OF APPEALS

This cause, here on appeal from the Court of Appeals for Hamilton County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Hamilton County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Hamilton County for entry.

(Court of Appeals Nos. C870627 & C870634)

/s/ THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO
1990 TERM
To wit: August 8, 1990

Case No. 89-1178

NATIONAL AMUSEMENTS, INC.,
Appellant,

v.

CITY OF SPRINGDALE,
Appellee.

MANDATE

To the Honorable Court of Common Pleas
Within and for the County of Hamilton, Ohio.

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Judgment of the court of appeals is affirmed consistent with the opinion rendered herein.

COSTS:

Motion Fee, $20.00, paid by Strauss & Troy.
(Court of Appeals Nos. C870627 & C870634)

/s/ THOMAS J. MOYER
Chief Justice

NATIONAL AMUSEMENTS, INC., APPELLANT, *v.*
CITY OF SPRINGDALE, APPELLEE.

[Cite as National Amusements, Inc. *v.* Springdale (1990), 53 Ohio St. 3d 60.]

Judgments—Change in decisional law which might reverse the outcome in a prior civil action does not bar the application of the doctrine of res judicata—Exceptions to the doctrine's application narrowly construed.

O.Jur 3d Judgments §§ 400, 435.

Generally, a change in decisional law which might arguably reverse the outcome in a prior civil action does not bar the application of the doctrine of *res judicata*. Since the doctrine of *res judicata* serves important public and private interests, exceptions to the doctrine's application should be narrowly construed. (*LaBarbera* v. *Batsch* [1967], 10 Ohio St. 2d 106, 39 O.O. 2d 103, 227 N.E. 2d 55; *Berkey Farmers' Mut. Tel. Co.* v. *Sylvania Home Tel. Co.* [1917], 97 Ohio St. 67, 119 N.E. 140; *Michael* v. *American Natl. Bank* [1911], 84 Ohio St. 370, 95 N.E. 905, approved and followed.)

(No. 89-1178—Submitted June 5, 1990—
Decided August 8, 1990.)

APPEAL from the Court of Appeals for Hamilton County, Nos. C-870627 and C-870634.

Appellant, National Amusements, Inc., owns and operates Showcase Cinema, a multi-screen theatre located within the city of Springdale, the appellee. In 1978, the Springdale City council imposed a three percent sales tax on cinema admissions ("the cinema tax"). Shortly thereafter, National Amusements brought an action in the Court of Common Pleas of Hamilton County seeking to have the cinema tax declared unconstitutional on equal protection grounds. The trial court held in the city's favor, and the court of appeals affirmed. *National Amusements, Inc.* v. *Springdale* (1981), 3

Ohio App. 3d 70, 3 OBR 81, 443 N.E. 2d 1016 ("*National Amusements I*").

In 1983, the United States Supreme Court struck down a tax on paper and ink used in the printing of newspapers as violative of the First Amendment. *Minneapolis Star & Tribune Co.* v. *Minnesota Commr. of Revenue* (1983), 460 U.S. 575. On the basis of that decision, National Amusements filed the instant action seeking essentially the same relief as in *National Amusements I*.[1] In October 1984, during the pendency of this action, the Springfield city council imposed a three percent tax on admissions to places of entertainment other than cinemas ("the entertainment tax").

Following a trial on the merits, the court of common pleas held that the cinema tax "was discriminatorily applied to Showcase Cinema to the exclusion of all other similar businesses, violating its right to equitable taxation and putting an undue and unfair burden upon it in the exercise of its First Amendment rights" for the period between the effective date of the cinema tax and the effective date of the entertainment tax.

On appeal, the court of appeals held that *National Amusements I* rendered the instant case *res judicata* and reversed the judgment of the trial court.

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[1] The complaint filed in *National Amusements I* contained this prayer for relief:

"WHEREFORE, plaintiff prays that the Court enter a declaratory judgment pursuant to Rule 57, Ohio Rules of Civil Procedure, declaring that Chapter 97 of the Code of the City of Springdale is void and unenforceable, and that plaintiff is not required to collect, report, or remit the tax levied by said ordinance, nor is it subject to interest or penalty charges, civil or criminal[,] for failure to do so. Plaintiff further prays that, upon final adjudication that Chapter 97 of the Code of the City of Springdale is unconstitutional, the defendants be permanently enjoined from requiring collection, reporting, or remission of the aforesaid admission tax as provided by Chapter 97 of the Code of the City of Springdale."

The prayer for relief contained in the complaints filed in the instant case is nearly identical. The only difference is an additional clause demanding that the city "be required to remit to plaintiff all taxes it has paid to date pursuant to said ordinance."

This cause is before the court pursuant to the allowance of a motion to certify the record.

Strauss & Troy, Charles G. Atkins and *Larry A. Temin*, for appellant.

David A. Caldwell, Albert H. Neman, Wood & Lamping and *Kenneth J. Schneider*, law director, for appellee.

H. BROWN, J. For the reasons which follow, we find that the instant case is barred by the doctrine of *res judicata* and affirm the judgment of the court of appeals.

It has long been the law of Ohio that "an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit." (Emphasis added.) *Rogers* v. *Whitehall* (1986), 25 Ohio St. 3d 67, 69, 25 OBR 89, 90, 494 N.E. 2d 1387, 1388. "[W]here a party is called upon to make good his cause of action * * *, he must do so by all the proper means within his control, and if he fails in that respect * * *, he will not afterward be permitted to deny the correctness of the determination, nor to re-litigate the same matters between the same parties." *Covington & Cincinnati Bridge Co.* v. *Sargent* (1875), 27 Ohio St. 233, paragraph one of the syllabus. The doctrine of *res judicata* "encourages reliance on judicial decisions, bars vexatious litigation, and frees the court to resolve other disputes." *Brown* v. *Felsen* (1979), 442 U.S. 127, 131. "Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if * * * conclusiveness did not attend the judgments of such tribunals * * *." *Southern Pacific Rd. Co.* v. *United States* (1897), 168 U.S. 1, 49.

Appellant contends that the doctrine of *res judicata* is inapplicable because the claim in the instant case is not the same as that made in *National Amusements I*. We disagree.

National Amusements sought essentially the same relief in both actions.[2] The only difference between the two actions is

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[2] See fn. 1, *supra*.

the allegation, in the amended complaint filed in the instant case, that the cinema tax violates the First Amendment. This allegation is nothing more than an alternative ground for relief which could have been asserted in *National Amusements I*. The doctrine of *res judicata* requires a plaintiff to present every ground for relief in the first action, or be forever barred from asserting it. *Rogers, supra; Anderson* v. *Richards* (1962), 173 Ohio St. 50, 53, 18 O.O. 2d 252, 254, 179 N.E. 2d 918, 921; *Stratford Place Corp.* v. *Capalino* (S.D.N.Y. 1983), 574 F. Supp. 52, affirmed without opinion (C.A.2, 1984), 742 F. 2d 1441, certiorari denied (1984), 469 U.S. 824; see, also, *Johnson's Island, Inc.* v. *Danbury Twp. Bd. of Trustees* (1982), 69 Ohio St. 2d 241, 245-246, 23 O.O. 3d 243, 246, 431 N.E. 2d 672, 675 (defendant who fails to raise a defense in the first action is barred from raising it in a later action); *Univ. of New Hampshire* v. *April* (1975), 115 N.H. 576, 580-581, 347 A. 2d 446, 450-451 (claim in second action which amounted to a defense not raised in the first action barred by *res judicata*). Accordingly, we reject appellant's first proposition of law.

Appellant also argues that the instant case should be exempted from the doctrine of *res judicata* because *Minneapolis Star & Tribune Co.* v. *Minnesota Commr. of Revenue* (1983), 460 U.S. 575, worked "a fundamental change in the controlling law" following the court of appeals' decision in *National Amusements I*.

Because a strict application of *res judicata* might frustrate other objectives of the legal system, "a series of exceptions have evolved to accommodate what are deemed to be these more important policies. However, it is important to note that although a number of cases may speak in terms of allowing an exception as being in the 'public interest' or because it avoids 'injustice,' these generally are overstatements. * * * [E]xceptions to res judicata most commonly and properly are invoked only in specialized situations in which a specific policy is deemed to outweigh judicial economy concerns." (Footnotes omitted.) Friedenthal, Kane & Miller, Civil Procedure (1985) 656, Section 14.8. For example, habeas corpus

actions are exempt from *res judicata* because "[c]onventional notions of finality of litigation have no place where life or liberty is at stake * * *." *Sanders* v. *United States* (1963), 373 U.S. 1, 8.

Generally, a change in decisional law which might arguably reverse the outcome in a prior civil action does not bar the application of the doctrine of *res judicata*. *LaBarbera* v. *Batsch* (1967), 10 Ohio St. 2d 106, 109-111, 39 O.O. 2d 103, 105-107, 227 N.E. 2d 55, 59-60; *Berkey Farmers' Mut. Tel. Co.* v. *Sylvania Home Tel. Co.* (1917), 97 Ohio St. 67, 74, 119 N.E. 140, 142; *Michael* v. *American Natl. Bank* (1911), 84 Ohio St. 370, 95 N.E. 905; see *Doe* v. *Trumbull Cty. Children Services Bd.* (1986), 28 Ohio St. 3d 128, 28 OBR 225, 502 N.E. 2d 605 (change in controlling decisional law does not support Civ. R. 60[B] motion for relief from judgment). "To hold otherwise would enable any unsuccessful litigant to attempt to reopen and relitigate a prior adverse final judgment simply because there has been a change in controlling case law. Such a result would undermine the stability of final judgments and, in effect, render their enforceability conditional upon there being 'no change in the law.' " *Doe*, *supra*, at 131, 28 OBR at 227, 502 N.E. 2d at 608 (quoting *Parks* v. *U.S. Life & Credit Corp.* [C.A. 11, 1982], 677 F. 2d 838, 841).

This general rule applies to changes in constitutional law. "That the change in legal doctrine is constitutional in nature does not, automatically, dictate a different result." *Gowan* v. *Tully* (1978), 45 N.Y. 2d 32, 36, 407 N.Y. Supp. 2d 650, 652-653, 379 N.E. 2d 177, 180 (challenge to dismissals of civil service employees barred by *res judicata* despite later United States Supreme Court case calling constitutionality of such dismissals into question).

Some courts have recognized an exception to the doctrine of *res judicata* where there has been "a major change in constitutional principles as applied to areas of continuing conduct * * *." Friedenthal, Kane & Miller, *supra*, at 657, Section 14.8; see, also, *Gowan*, *supra*, at 36-37, 407 N.Y. Supp. 2d at 653, 379 N.E. 2d at 180. Though broadly worded, this

exception is actually quite narrow, having been applied almost exclusively to school desegregation cases. See *Moch* v. *East Baton Rouge Parish School Bd.* (C.A. 5, 1977), 548 F. 2d 594 (challenge to apportionment of multimember school board election districts); *Bronson* v. *Cincinnati School Dist. Bd. of Edn.* (C.A. 6, 1975), 525 F. 2d 344 (school desegregation; *res judicata* held to be applicable); *Christian* v. *Jemison* (C.A. 5, 1962), 303 F. 2d 52 (segregated seating); *Griffin* v. *State Bd. of Edn.* (E.D. Va. 1969), 296 F. Supp. 1178 (racially discriminatory system of state school tuition grants).

Because of the important public and private interests served by the doctrine of *res judicata*, see *Brown*, *supra*; *Southern Pacific*, *supra*, courts should be slow to broaden the few existing exceptions lest they abrogate the rule. Given the facts and circumstances of the instant case, appellant has not persuaded us to exempt the instant case from the doctrine of *res judicata*.

In view of our disposition of appellant's first and second propositions of law, we need not reach the issue of the constitutionality of the cinema tax.[3] The judgment of the court of appeals is affirmed.

Judgment affirmed.

MOYER, C.J., SWEENEY, HOLMES, DOUGLAS, WRIGHT and RESNICK, JJ., concur.

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[3] While we do not reach the merits of appellant's constitutional arguments, we do note that the facts of the instant case are significantly different from those in *Minneapolis Star*, *supra*. Consequently, it is far from certain that appellant would prevail on the merits.

NO. 89-1178

IN THE SUPREME COURT OF OHIO

Appeal From The Court of Appeals
First Appellate District,
Hamilton County, Ohio

NATIONAL AMUSEMENTS, INC.,
Plaintiff-Appellant,
v.
CITY OF SPRINGDALE, et al.,
Defendants-Appellees.

BRIEF OF PLAINTIFF-APPELLANT NATIONAL AMUSEMENTS, INC.

Charles G. Atkins (No. 0022368)
Larry A. Temin (No. 0022402)
STRAUSS & TROY
2100 Central Trust Center
Cincinnati, Ohio 45202-4186
(513) 621-2120
Attorneys for Plaintiff-Appellant

David A. Caldwell (No. 0000954)
Albert H. Neman (No. 0012272)
2500 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202-2409
(513) 852-6000
Attorneys for Defendants-Appellees

OF COUNSEL:
Wood & Lamping
Kenneth J. Schneider,
Law Director

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COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

NO. C-870627
C-870634
A-8405635

NATIONAL AMUSEMENTS, INC.,
Plaintiff-Appellee, Cross-Appellant,
vs.
CITY OF SPRINGDALE
and
DOYLE H. WEBSTER, CLERK-TREASURER,
Defendants-Appellants, Cross-Appellees.

TO THE CLERK:
ENTER UPON THE JOURNAL OF THE COURT 5-10
PER ORDER OF THE COURT.

By SHANNON
Presiding Judge

JUDGMENT ENTRY

This cause came on to be heard upon the appeals on questions of law, assignments of error, the record from the Court of Common Pleas of Hamilton County, Ohio, the briefs and the arguments of counsel.

Upon consideration thereof, the Court finds that the assignments of error are well taken in part for the reasons set forth in the Decision filed herein and made a part hereof.

It is, therefore, Ordered by the Court that the judgments of the Court of Common Pleas of Hamilton County, Ohio, be, and the same hereby are, reversed and final judgment entered as to C-870627 and affirmed as to C-870634.

It is further Ordered that a mandate be sent to the Court of Common Pleas of Hamilton County, Ohio, for execution upon this judgment.

Costs to be taxed in compliance with Rule 24, Appellate Rules.

And the Court being of the opinion that there were reasonable grounds for this appeal, allows no penalty.

It is further Ordered that a certified copy of this Judgment, with a copy of the Decision attached, shall constitute the mandate pursuant to Rule 27, Ohio Rules of Appellate Procedure.

Exceptions noted.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

APPEAL NOS. C-870627
C-870634
TRIAL NO. A-8405635

NATIONAL AMUSEMENTS, INC.,
Plaintiff-Appellee, Cross-Appellant,
vs.
CITY OF SPRINGDALE
and
DOYLE H. WEBSTER, CLERK-TREASURER,
Defendants-Appellants, Cross-Appellees.

DECISION

Civil Appeal from: Court of Common Pleas

Judgment Appealed from is: Reversed and Final Judgment Entered as to C-870627; Affirmed as to C-870634

Date of Judgment Entry on Appeal: May 10, 1989

Strauss & Troy and Charles G. Atkins, Esq., 2100 Central Trust Center, Cincinnati, Ohio 45202, for Plaintiff-Appellee, Cross-Appellants.

Wood & Lamping, David A. Caldwell, Esq., and Albert H. Neman, Esq., 900 Tri-State Building, Cincinnati, Ohio 45202, for Defendants-Appellants, Cross-Appellees.

PER CURIAM.

This cause came on to be heard upon the appeals, the transcripts of the docket, journal entries and original papers from the Hamilton County Common Pleas Court, the transcript of the proceedings, the briefs and the arguments of counsel.

In an earlier appeal,[1] we upheld the facial constitutionality of the ordinance[2] of The City of Springdale that imposed a 3% cinema admissions tax. In the earlier case there was no express claim of discriminatory application.

In the case presently on review, National Amusements alleged in its amended complaint that Ordinance No. 67-1978 is unconsitutional as applied to National Amusements and sought a declaratory judgment that the ordinance is void and unenforceable as applied to the plaintiff. The complaint was filed July 10, 1984, and the amended complaint was filed January 9, 1985.

On October 1, 1984, the City of Springdale enacted an ordinance titled "Entertainment Admissions Tax." This measure was codified as Chapter 98 of the Springdale Code of Ordinances. This admissions tax applied to all places in Springdale offering entertainment and demanding an admission price, except cinemas. The tax imposed was 3% of the admission price, the same rate imposed in the cinema admissions tax.

By an amended judgment entry dated June 29, 1987, the trial court found in favor of National Amusements and ordered Springdale to refund to National Amusements $535,139.14 for the cinema admissions tax previously collected for the period from November 15, 1978, to October 28, 1984.[3] An interlocutory entry that is dated February 8, 1985 granted Springdale's motion for summary judgment to the ex-

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[1] *National Amusements, Inc.* v. *Springdale* (Nov. 18, 1981), Hamilton App. No. C-800842, unreported.

[2] Ordinance No. 67-1978, enacted Nov. 15, 1978, effective Jan. 1, 1979, Springdale Code of Ordinances, Chap. 97.

[3] We are not advised of nor does the record reflect any concern of the parties relative to the beginning and ending dates of the period for which a refund was ordered. Ordinance No. 67-1978, the Cinema Admissions Tax, was enacted on November 15, 1978, but not effective until January 1, 1979. The written opinion of the trial judge specified the terminal date to be October 1, 1984.

tent of National Amusement's claim for relief based on events occurring after October 1, 1984, the effective date, we presume, of the entertainment admissions tax.

Both parties have appealed, independently: the City of Springfield and Doyle H. Webster, its Clerk-Treasurer, are the appellants in case number C-870627, and National Amusements, Inc. is the appellant in case number C-870634. Although the two appeals were not formally consolidated, in the interest of judicial economy we address them together.

C-870627

The appellants in this case present three assignment of error. The first assignment protests the failure of the trial court to find that the doctrine of *res judicata* is a bar to the prosecution of this case by National Amusements. This assignment has merit.

In the earlier case involving the same parties and numbered on the docket of the trial court as A-8711145, we affirmed the judgment finding the cinema admissions tax to be facially constitutional.[4] The case presently on review bears the trial court number A-8405635 and the judgment in this case, as previously observed, was that the cinema admissions tax had been unconstitutionally applied to National Amusements. The trial court concluded it was "evident that Springdale singled out the movie theatre business for an admissions tax, even though another competing business, protected by the First Amendment, was not subjected to the tax."[5]

In our earlier opinion finding the cinema admissions tax to be facially constitutional, we were called upon to determine the propriety of the grant of summary judgment upholding the constitutionality of the cinema admissions tax. On the case therein made, we observed that if National Amusements

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[4] *National Amusements, Inc.* v. *Springdale* (1981), 3 Ohio App. 3d 70, 443 N.E.2d 1016, motion to certify record overruled (Feb. 17, 1982), No. 82-42.

[5] T.d. 48, Opinion, June 3, 1987, pg. 9.

had submitted permissible evidentiary documentation of discriminatory application, a "factual dispute might arise" making summary judgment inappropriate. The trial court in the case on review concluded that since National Amusements now alleges discriminatory application, our earlier opinion authorized the appellee to maintain the instant action. That statement, upon which the trial court relied, was made to make clear that a summary disposition of the earlier case was proper, there being no genuine issues of material fact; it was not an advisory opinion that should National Amusements bring another action alleging discriminatory application (having failed in its earlier attempt to have the ordinance declared unconstitutional), it would stand against a defense of *res judicata*.

The complaint in the earlier case, A-7811145, is a part of the record in the case on review, A-8405635, as Exhibit A attached to appellants' motion for summary judgment. A comparison of the complaints in the two cases leads to the conclusion that there is no substantive difference in the complaints. Each complaint alleges constitutional provisions, state and federal, that are allegedly violated by the cinema admissions tax. The evidence shows that all the facts upon which the appellee relies to show an alleged discriminatory application of the tax existed and were known at the time of the first action. They could have been litigated in the first action.

The Supreme Court of Ohio within the last three years stated:

> The doctrine of *res judicata* is an integral part of the law of this state. For purposes of the matters before us, this doctrine is that an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were or might have been litigated in a first lawsuit.

Rogers v. *Whitehall* (1986), 25 Ohio St. 3d 67, at 69, 494 N.E.2d 1387, 1388. We are aware that, by footnote 3, the Supreme Court observed that Rogers did not present a question relative to that portion of the doctrine applicable to

claims which "might have been litigated" in the earlier case. That question does confront this court and we hold, on the facts present in the two cases, that the claims made in the case on review should have been presented in the earlier case.

In *Henderson* v. *Ryan* (1968), 13 Ohio St. 2d 31, 233 N.E.2d 506, the court held that the doctrine of *res judicata* would not be appled to "might have been litigated" situations where a statute, R.C. 2309.06 applicable at the time but since repealed, prevented the joinder of causes not affecting all the parties to the action. In the case on review we have no problem of identity of the parties. We find this statement in *Henderson* to be apposite:

> To save time and to relieve court congestion, parties are encouraged, if not commanded, to litigate all their claims in one action, except to the extent that joinder of multifarious and complex issues would produce confusion and prejudice. Defendants and the courts are thus saved from vexation caused by multiple litigation.

Henderson v. *Ryan*, *supra* at 38, 233 N.E.2d at 511.

The first assignment of error is valid; the trial court erred in failing to apply the doctrine of *res judicata*.

The second assignment in number C-870627 claims error in the finding that the ordinance was unconstitutionally applied to the appellee from its enactment on November 15, 1978, to October 1, 1984. This assignment of error is undoubtedly subsumed in our resolution of the first assignment of error; however, pursuant to the mandate of App. R. 12(A) we take the opportunity to reiterate a part of our holding in *National Amusements, Inc.* v. *Springdale*, *supra*.

The appellants particularize this assignment with the following issue for review:

> Can a court hold a tax on all cinemas in a municipality to be unconstitutional when all cinemas are taxed at the same rate and when there is evidence showing justification for the tax?

This assignment and issue was directly addressed in *National Amusements, Inc.* v. *Springdale, supra*, in the following terms:

> A taxing authority may discriminate between trades and activities and is not required to follow any predetermined method of classifying those which it selects for taxation, provided the classification rests "upon some ground of difference having a fair and substantial relation to the object of the legislation." *F. S. Royster Guano Co.* v. *Commonwealth of Virginia* (1920), 253 U.S. 412, 415, 40 S. Ct. 560, 561-562.

We further stated, citing the authority of *Brown-Forman Co.* v. *Kentucky* (1910), 217 U.S. 563, 573, 30 S. Ct. 578, 580, that if the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of differences or policy, there is no denial of the equal protection of law.

We find none of the prohibiting conditions or circumstances to be present in the case on review. Accordingly, we find the second assignment of error to be well-made.

The third and final assignment of error in case number C-870627 is directed to the awarding of interest to National Amusements on the amount of taxes alleged to have been unconstitutionally imposed. We sustain this assignment of error.

Our determination of the first and second assignments of error undoubtedly renders moot appellant's third assignment. We elect, however, to respond to the third assignment in compliance with App. R. 12(A).

A review of statutory and case law reveals no precedent for the specific problem raised by the third assignment of error. The Supreme Court of Ohio has held that the payment of interest on refunded *ad valorem* taxes illegally collected is precluded in the absence of any statutory authority for interest. *General Electric Co.* v. *DeCourcy* (1979), 60 Ohio St. 2d 68, 397 N.E.2d 397. The appellee contends that it is entitled to interest as consequential damages for the illegal collection of an excise tax. We disagree.

Appellee characterizes the interest award as consequential damages. In view of the fact that the admissions tax allegedly wrongfully collected is an excise tax not due until the admission has been paid, we find that the borrowing of money to pay the admission tax is too remote to be considered compensable as interest on the excise tax.

We therefore conclude that the trial court erred in awarding interest to the appellee and sustain the third assignment of error.

C-870634

In its independent appeal, National Amusements, Inc. presents as its solitary assignment of error the granting of Springdale's motion for summary judgment on the ground that the cinema admissions tax was constitutionally valid after October 1, 1984. We find the assignment is not well-made.

Based upon our reasoning in Springdale's appeal, we find that there is no genuine issue of material fact as to the constitutionality of the cinema admissions tax after October 1, 1984, and that Springdale is entitled to judgment in its favor as a matter of law.

The judgment appealed from in C-870627 is reversed and final judgment is entered in favor of the City of Springdale and Doyle H. Webster, its Clerk-Treasurer.

The judgment appealed from in C-870634 is affirmed.

HILDEBRANDT, P.J., KLUSMEIER and UTZ, JJ.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT
HAMILTON COUNTY, OHIO

Appeal No. C-870627

NATIONAL AMUSEMENTS, INC.,
Plaintiff-Appellee
and Cross-Appellant

vs.

CITY OF SPRINGDALE, *et al.*,
Defendants-Appellant.

APPEAL AND CROSS-APPEAL FROM THE COURT OF COMMON PLEAS, HAMILTON COUNTY, OHIO

BRIEF OF PLAINTIFF-APPELLEE AND CROSS-APPELLANT NATIONAL AMUSEMENTS, INC.

(Filed February 29, 1988)

Charles G. Atkins
2100 Central Trust Center
Cincinnati, Ohio 45202
(513) 621-2120

Attorney for Plaintiff
Appellee and Cross-Appellant
National Amusements, Inc.

OF COUNSEL: Strauss & Troy
Patricia A. Blank

David A. Caldwell
Albert H. Neman
Attorneys for Defendants-Appellants
900 Tri-State Building
Cincinnati, Ohio 45202
(513) 852-6031

OF COUNSEL: Wood & Lamping
Kenneth J. Schneider
Law Director

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were not under consideration, were not litigated and were not determined in the first action.

Authorities:

COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

Case No. C-870627
C-870634

NATIONAL AMUSEMENTS, INC.,
Plaintiff-Appellee

vs.

CITY OF SPRINGDALE,
DOYLE H. WEBSTER, CLERK TREASURER
Defendants-Appellant.

BRIEF OF DEFENDANTS-APPELLANT
CITY OF SPRINGDALE AND DOYLE H. WEBSTER
(Filed December 22, 1987)

David A. Caldwell
Albert H. Neman
Attorneys for
Defendants-Appellant
900 Tri-State Building
Cincinnati, Ohio 45202
(513) 852-6031
OF COUNSEL:
WOOD & LAMPING
Kenneth J. Schneider
Law Director

Charles G. Atkins
Attorney for Plaintiff-Appellee
2100 Central Trust Center
Cincinnati, Ohio 45202
(513) 621-2120
OF COUNSEL:
Strauss & Troy

TABLE OF CONTENTS AND ASSIGNMENT OF ERRORS

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A8405635
(Crush, J.)

NATIONAL AMUSEMENTS, INC.,
Plaintiff,
v.
CITY OF SPRINGDALE, et al*
Defendants.

AMENDED ENTRY OF FINAL JUDGMENT
(Entered June 29, 1987)

This matter was tried on the merits before the Court which thereafter has rendered its decision in writing in favor of the plaintiff. In conformity with said written decision which is by reference incorporated in this Entry, it is hereby:

ORDERED that plaintiff recover damages from the defendant in the sum of $535,139.14 for admissions taxes previously and unconstitutionally collected for the period from November 15, 1978 to October 28, 1984, and in the further sum of $258,695 for the cost paid by plaintiff in interest for the loss of use of the said $535,139.14 during the aforementioned period of time. Court costs of this action are awarded to plaintiff.

HAVE SEEN:

/s/ CHARLES G. ATKINS
Trial Attorney for Plaintiff

/s/ ALBERT H. NEMAN
Trial Attorney for Defendant

/s/ THOMAS H. CRUSH, Judge
Court of Common Pleas

* And DOYLE H. WEBSTER, Clerk-Treasurer, City of Springdale, Ohio

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

No. A-84-05635

NATIONAL AMUSEMENTS, INC.,
Plaintiff,

vs.

CITY OF SPRINGDALE,
Defendant.

OPINION
(Filed June 3, 1987)

This matter is before the Court for a decision on the merits.

On November 15, 1978, the Council of the City of Springdale, Ohio, passed an ordinance providing for a 3% cinema admissions tax for admission to any cinema in the city. The ordinance did not impose the tax on any other places of business, amusement or recreation.

National Amusements, Inc., at that time, and continuing to the present day, owned and operated the only cinema in Springdale, to-wit; the Showcase Cinema, a multi-screen facility.

In an earlier case, National Amusements claimed that the ordinance was unconstitutional on its face. The Court of Appeals, First Appellate District, found otherwise by its decision docketed November 18, 1981, in which it stated:

> "These allegations present solely the question of whether the ordinance is facially unconstitutional, there being no claim of discriminatory application."
>
> "If plaintiff had presented in its complaint, or in any evidentiary documentation associated with its motion for summary judgment, any claim that other forms of entertainment existed in the city, so that the applica-

> tion of the tax on cinemas only would be impermissibly discriminatory, a factual dispute might arise."
>
> (Opinion of Court of Appeals, Case No. C-80-0842, pages 3 and 4)

In the present action, plaintiff claims that the ordinance was discriminatory in fact because there was another place of entertainment (a night club) in Springdale, The Boulevard, which was not subject to the tax. Additionally, plaintiff claims that the ordinance was violative of plaintiff's First Amendment rights to free speech. The latter claim is based on the allegations that the tax impermissibly put an economic burden on the exercise of free speech.

There is no question that entertainment is protected by the free speech guarantees of the First Amendment:

> ". . . (M)otion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee."
>
> (*Schad* v. *Mt. Ephraim* (1981) 68 L.Ed.2d 671, 678)

Thus, both the Showcase Cinema, which presented movies, and the Boulevard, which presented live music, are equally entitled to the protections of the First Amendment:

> "We do not accede to appellee's suggestion that the constitutional protection for a free press applies only to the exposition of ideas. The line between the informing and the entertaining is too elusive for the protection of that basic right. Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine."
>
> (*Winters* v. *New York* (1948) 92 L.Ed. 840, 847).

Taxation of the press (including entertainment) cannot be accepted unless a compelling state interest is involved:

> "(D)ifferential taxation of the press places . . . such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the state asserts a counter-balancing interest of compelling importance that it cannot achieve without differential taxation."
>
> (*Minneapolis Star* v. *Minnesota Comm. of Rev.* (1983) 75 L.Ed.2d 295, 305)

The question here is, therefore, whether the special tax treatment of movie entertainment in Springdale can be justified by some counterbalancing interest of compelling importance in the city of Springdale.

The interest of Springdale, whether compelling or not, is clear. The ordinance in question reads, in pertinent part, as follows:

> "Whereas, the City of Springdale, Ohio, desires to offset the cost of additional municipal services and to provide additional revenue by the levy of a tax of three percent on the amounts received for admission to any cinema in the City of Springdale . . ."
>
> (Joint Exhibit 1).

As pointed out in plaintiff's post-trial brief, the main concern of the council of Springdale in passing the ordinance was to generate general revenue, not to offset the cost of the Showcase Cinema:

> "Q. The underlying reason [for the ordinance] was to increase revenue to the City, isn't that correct?
>
> "A That's true."
>
> [Testimony of Doyle Webster, City Treasurer; Transcript, page 207]
>
> "Q. (O)f those purposes which you just read, general municipal operations, maintenance, new equip-

ment, extension and enlargement of municipality services and facilities and capital improvements by the city, taking those as a group, Mr. Webster, it is true, is it not, that no one of those reasons had such predominant importance as to outweigh any of the other reasons given?

"A. I think that's a true statement."

(Ibid, page 209)

The total expenditure that can arguably be attributed to Showcase Cinema is $47,945.00 (Defendant's exhibit 9). The total tax collected from Showcase Cinema for the period in question was $535,139.14 (Transcript, page 29).

The Boulevard, a nightclub, has operated under that name in Springdale since 1972 (Transcript, page 55). The club features live country music (ibid, pp. 55, 56), and has charged admission since 1972 (ibid, pg. 57). The Boulevard has been required to pay an admissions tax to Springdale only since October 1, 1984 (ibid, pp. 60, 61: Joint exhibit 2). Since at least 1972, the club has paid an annual cabaret license charge of $1000.00, which is required for a dance hall which charges admission (trans., pg. 62). The council of Springdale has, since about 1984, allowed the cabaret license charge to be a credit against the admissions tax (trans., pp. 64, 65). The owner of The Boulevard considers Showcase Cinema to be one of his competitors (ibid, pg. 67).

What, then, was the rationale for requiring Showcase Cinema to pay an admissions tax but not requiring the same of The Boulevard? It has not been argued that movies have a lesser intellectual content than country western lyrics, and, therefore, somehow, less entitled to First Amendment protection — nor would the Court delve into such a controversial topic. As was stated in *Winters* (supra), "what is one man's amusement, teaches another's doctrine."

It has been argued that the cabaret license charge approximated the monies that would have been paid if an admissions tax had been charged. However, the approximation of

equal payments is only that. In 1985 and 1986 The Boulevard owed $77.00 and $38.00, respectively, over and above the $1000.00 cabaret license charge (trans., pg. 95). Significantly, The Boulevard's business has lessened so much so that it is not filled very often anymore (trans., pg. 96). Thus, it is apparent that the admissions tax, had there been one in earlier years, would have been substantially higher. In any case, a cabaret license for dancing is not the same thing as an admissions tax.

It is abundantly clear that the reason that the admissions tax was imposed on Showcase Cinema rather than The Boulevard is that Showcase had, by far, the bigger pocket. Significantly more people attended the Showcase Cinema (trans., pg. 97). The Showcase Cinema has averaged about 1,000,000 paying customers a year since 1979 (plaintiff's exhibit 1); whereas, with a declining patronage, The Boulevard had about 14,000 people pay admission fees in 1985 (trans., pg. 96).

Nonetheless, both Showcase Cinema and The Boulevard attract a substantial number of patrons to their premises. The 14,000 figure for The Boulevard may include only the attendance for Friday and Saturday evening, whereas The Boulevard is open as many as four or five days a week. Thus, both The Boulevard and Showcase represent a potential burden on municipal services such as police, fire and life squad, and traffic; although, obviously, the potential burden of the Showcase Cinema is much greater. The constitutional ramifications of taxing one and not the other of two organizations protected by First Amendment guarantees was described in *Minneapolis Star* v. *Minnesota Commissioner of Revenue* (1983) 75 L.Ed.2d 295:

> "Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers. The effect of the $100,000 exemption . . . is that only a handful of publishers pay any tax at all . . . Whatever the motive of the legislature in this, we

think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme . . ."

(Pages 308, 309).

A recent California case has addressed the problem of singling out movies for taxation:

"We hold that the city's 'admissions tax', as applied to plaintiff theatre owners, imposes an impermissible burden on protected speech in violation of the free speech and equal protection clauses of the First and Fourteenth Amendments of the United States Constitution . . .

". . . (T)he Pleasant Hill City Council adopted ordinance No. 525 . . . which levies a 5 percent tax on the admission price of sporting events, movie theatres, concerts, shows, museums, performances, displays and exhibitions within the city. This tax was enacted primarily to provide revenue for needed street repairs . . .

"Although the ordinance is broadly worded to apply to other forms of entertainment, plaintiff's theatres are the only businesses currently affected by the tax . . . The parties agree that other businesses subject to the tax do not now exist in the city and it is not known when, if ever, such businesses will appear in the future . . .

"The showing of commerical motion pictures . . . is protected by the free speech and free press guaranties of the First and Fourteenth Amendments . . .

". . . (S)pecial deference must be paid to businesses engaged in protected speech, and such activities may not be singled out for discriminatory tax treatment,

unless the state asserts a counter-balancing interest of compelling importance that it cannot achieve without differential taxation.

(*Minneapolis Star* v. *Minnesota Comm'r of Rev.*"

". . . The main interest asserted by the city . . . was the raising of revenue. While this interest is critical to the operation of any government, '(s)tanding alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available; the [city] could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press.' (Minneapolis Star v. Minnesota Comm'r of Rev. . . .).

"The city has shown no particular justification for this tax other than for general revenue purposes . . . There is no contention that the additional revenue is needed because of the increased use of city services required by virtue of the operation of plaintiff's theatres . . .

"The fact that a tax *rate* is uniform does not somehow make it less burdensome on the protected activity. The effect of the tax on other entertainment is illusory . . .

"Any law which is nondiscriminatory on its face may be applied in such a way as to be unconstitutional . . . . (T)he courts are always concerned with 'the practical operation of the tax, that is, substance rather than form'.

". . . (W)e cannot ignore the present unfairness [of the tax] and rely only upon a hypothetical situation that *might* save the tax scheme in the future. There is no evidence that other businesses are contemplated."

(*Festival Enterprises, Inc.* v. *City of Pleasant Hill* (1986) 227 Cal. Rptr. 601).

In another California case we read as follows:

"Ordinance No. 1991, enacted on December 4, 1979, amended the portion of the City's municipal code dealing with business licenses, by imposing a business license tax of 3 percent of annual gross receipts upon '[e]very person conducting a television subscription service business' and upon businesses providing emergency communications systems or alarms. . . .

"The First Amendment prohibits the enactment of any law 'abridging the freedom of speech, or of the press . . .,' and is applicable to state and municipal action pursuant to the Fourteenth Amendment. . . .

". . . (m)ost businesses are permitted to pay 'in lieu' license fees based upon gross receipts rather than the other fees set forth in the code. The 'in lieu' tax schedule ranges from $0.30 per $1,000.00 to $2.25 per $1,000.00. . . .

"It is thus apparent that the two types of businesses subject to Ordinance No. 1991 are taxed differently from any other business in the City. Not only is Premier taxed differently from the great majority of businesses, it is also taxed in a differentially more burdensome manner. . . .

"In an attempt to justify such differential treatment, City argues that a legitimate distinction can be drawn between businesses which may elect to be taxed under the optional 'in lieu' schedule and those — such as Premier — which may not. It contends that the former pay taxes and provide employment in the City of Alameda, while the latter do not. We remain unconvinced. Many of the business activities precluded from 'in lieu' tax schedule treatment (e.g., outdoor advertisers, amusement parks and exhibitions, drive-in theaters, dance halls, handbill distributors and rental services) undoubtedly pay city property taxes and employ local residents.

> The City has shown no adequate justification for the special treatment of television subscription service businesses. In *Minneapolis Star*, the Supreme Court observed that the State of Minnesota could have achieved its goal of raising revenue by simply taxing businesses generally (____ U.S. at p. ____, 103 S.Ct. at p. 1372, 75 L.Ed.2d at p. 305; cf. *United States* v. *Lee*, *supra*, 455 U.S. 252, 102 S.Ct. 1051, 71 L.Ed.2d 127 [generally applicable tax enforceable notwithstanding religious objections]). Here, although the City could have likewise achieved a similar objective by imposing a generally applicable tax on business, it chose not to do so."
>
> (*City of Alameda* v. *Premier Communications* (1984) 202 Cal.Rptr. 684).

From the foregoing, it is evident that Springdale singled out the movie theatre business for an admissions tax, even though another competing business, protected by the First Amendment, was not subjected to the tax. It is clear that the basic purpose of the admissions tax was to raise revenue for general municipal purposes. The wording of the ordinance indicates that additional municipal costs related to Showcase were a factor, albeit minor, leading to the enactment of the tax. Although the added costs were not anywhere near the amount generated by the tax, nonetheless additional expenses can always be used to argue for additional taxes. The additional expenses in this matter, however, do not justify the singling out of the Showcase Cinema. A general tax, for example, on all forms of entertainment would have been possible and even more effective in raising revenue and, in fact, such an ordinance went into effect on October 1, 1984. As indicated in *Minneapolis Star* (supra), the "deep pocket" is not justification for creating a separate class of taxpayers, especially where First Amendment protection is involved. Although The Boulevard paid a cabaret license fee, this fee (1) was not an admissions tax and (2) did not cover the amount that would have been paid under an admissions tax.

In effect, Showcase was penalized not only with a tax that The Boulevard did not have to pay, but was taxed at a higher rate than The Boulevard even had the cabaret license fee been instead an admissions tax. The burden upon municipal services was essentially of the same type both for Showcase and The Boulevard.

In summation, the admissions tax was discriminatorily applied to Showcase Cinema to the exclusion of all other similar businesses, violating its right to equitable taxation and putting an undue and unfair burden upon it in the exercise of its First Amendment rights.

The offending unfair taxation continued from November 15, 1978 to October 1, 1984, at which time an additional ordinance subjected all entertainment enterprises to the same 3% tax. The measure of damages to Showcase is the amount of admissions tax paid between November 15, 1978, to October 1, 1984; which is in the amount of $535,139.14 plus $258,195.00 interest. Judgment is awarded plaintiff accordingly.

Counsel shall present the appropriate entry, properly endorsed, on or before June 25, 1987, 1:00 P.M.

/s/ THOMAS H. CRUSH, Judge

Charles G. Atkins, Esq.
Attorney for Plaintiff
2100 Central Trust Center
201 E. 5th St.
Cincinnati, OH 45202

Albert H. Neman, Esq.
Attorney for Defendant
800 Tri-State Bldg.
432 Walnut St.
Cincinnati, OH 45202

COURT OF COMMONS PLEAS
HAMILTON COUNTY, OHIO

CASE NO. A8405635
(Judge Crush)

NATIONAL AMUSEMENTS, INC.,
Plaintiff,

vs.

CITY OF SPRINGDALE
and
DOYLE H. WEBSTER, Clerk-Treasurer,
Defendants.

ENTRY SUSTAINING IN PART AND OVERRULING IN PART DEFENDANT'S MOTION TO SUMMARY JUDGMENT
(Entered February 8, 1985)

This action came before the Court on the motion of the Defendant for Summary Judgment and upon the pleadings, briefs and oral argument. On January 28, 1985, Judge Thomas H. Crush promulgated his opinion which is incorporated by reference.

Accordingly, the Defendant's Motion for Summary Judgment is sustained for the period commencing October 1, 1984 and it is overruled for the period January 1, 1979 through September 30, 1984.

/s/ CHARLES G. ATKINS
Trial Counsel for Plaintiff

/s/ ALBERT H. NEMAN
Trial Counsel for Defendant

COUNTY OF HAMILTON
COURT OF COMMON PLEAS
Cincinnati, Ohio 45202

Charles G. Atkins, Esq.
Attorney at Law
2100 Central Trust Center
201 E. 5th Street
Cincinnati, Ohio 45202

Albert H. Neman, Esq.
Attorney at Law
800 Tri-State Building
432 Walnut Street
Cincinnati, Ohio 45202

Re: National Amusements, Inc. v. City of Springdale. Case No. A-84-05635.

OPINION
(Filed Jan. 29, 1985)

Gentlemen:

This matter is before the Court upon Motion for Summary Judgment filed on behalf of defendants, together with relevant pleadings, affidavits, memoranda and oral argument.

Plaintiff prays the Court to declare that Chapter 97 (taxing cinemas) of the Code of the City of Springdale is unconstitutional and unenforceable as it is applied to the plaintiff.

Defendants have countered plaintiff's prayer with the motion for summary judgment in question here, alleging that this matter has been previously litigated and cannot be relitigated.

First, we must address some evidentiary matters.

The complaint and amended complaint in this matter both refer to an attached exhibit "A". No exhibit is attached to either complaint. However, the exhibit referred to has apparently been presented otherwise by affidavit.

A total of five affidavits have been attached to various memoranda filed 10/9/84, 11/16/84 and 11/29/84. Four of these affidavits are signed by attorneys in this case.

When a lawyer testifies for his client in pending litigation, the Code of Professional Responsibility applies:

> "Dr 5-101.
>
> ——— ——— ——— ———
>
> "(B) A lawyer shall not accept employment in contemplated or pending litigation if he knows . . . that he . . . ought to be called as a witness, except that he may . . . testify.
>
> "(1) If the testimony will relate solely to an uncontested matter.
>
> "(2) If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony."

Thus, if an attorney tenders testimony in a pending case, the judge would act improperly, and perhaps unethically, to allow such testimony to be heard, unless it should come under one of the exceptions. In brief, the judge may allow the testimony to be heard if it is uncontested, or relates solely to a matter of formality and no substantial evidence in opposition will be offered.

Most of the evidence tendered by the affidavits clearly fits under the exceptions, pertaining as it does to verifying public documents or filings from other litigation. Other allegations in the affidavits pertain to alleged entertainment activities by establishments other than that of plaintiff, and to the alleged fact that they are not subject to a Chapter 97 amusement tax. Since it appears that these allegations, though substantive, are not contested, but only the legal ramifications thereof are contested, the court is free to consider all the allegations of all the affidavits.

The Court does caution counsel in the future to avoid the

use of attorney affidavits, if possible, to obviate needless concern with the Code of Professional Responsibility.

There seems to be no real dispute that the wording of the tax ordinance in question (Chapter 97) was found in Common Pleas Case #A-78-11145 (involving the same parties) to pass constitutional muster.

In this case plaintiff has attempted to raise issues as to the application of Chapter 97 in practice, taking its cue from the decision of the Court of Appeals, which read in pertinent part as follows:

> "If plaintiff had presented in its complaint, or in any evidentiary documentation associated with its motion for summary judgment, any claim that other forms of entertainment existed in the city so that the application of the tax on cinemas only would be impermissibly discriminatory, a factual dispute might arise. Plaintiff made no such claim, and no factual issues were presented to the trial court." (Opinion of First District Court of Appeals, Case #C-80-0842, appellate number for Common Pleas Case #A-78-11145).

Thus, as plaintiff's counsel has taken great pains to point out, there is a fundamental difference between this case and the earlier case, to-wit: the complaint in this case accepts the constitutionality of the wording of the ordinance but challenges the way the ordinance is applied, whereas the earlier case challenged the mere wording of the statute without regard to how it is applied. Since these challenges obviously involve separate factual considerations, this second action would not necessarily be estopped by the findings in the first case.

The alleged unconstitutionality of the Chapter 97 tax is based upon its alleged discriminatory application to one form of entertainment, to-wit, the cinema, leaving other forms of entertainment untouched by the tax.

Chapter 97 was passed by the City Council of Springdale on November 15, 1978, and provided in Section 97.02 that:

> "Commencing on January 1, 1979, . . . there is

> hereby levied a tax of . . . 3% . . . on the amounts received for admission to any cinema in the City of Springdale . . ."

Chapter 98 of the Springdale Code of Ordinances provides in Section 98.02 that:

> "There is levied a tax of 3% on the amounts received for admission to any entertainment in the city, except cinemas which are provided for separately in this code. Such tax is to be known as the 'entertainment admission tax.' The tax is levied for the period commencing October 1, 1984, and . . . subsequent periods . . ."

It is apparent that as of October 1, 1984, all entertainment in the City of Springdale is subject to a 3% admissions tax. As of that date, therefore, plaintiff's allegation that cinemas are discriminated against in relation to other forms of entertainment ceases to have any, even arguable, validity. The fact that the cinema tax is found in a different section of the code of ordinances from that involving other forms of entertainment, both taxes being identical, appears to the Court to have no significance. "A rose by any other name smells as sweet."

At most, therefore, plaintiffs can assert a claim for some detriment from the period January 1, 1979, the effective date of Chapter 97, to October 1, 1984, the effective date of Chapter 98.

Assuming that defendants are correct that cinema entertainment may be separately and solely taxed, as opposed to any other form of entertainment, the correctness of this assumption is based on city council's finding that certain problems requiring expenditure by the city are peculiar to cinema entertainment. Absent any evidence to the contrary, the correctness of this assumption may stand precisely because it is undisputed. However, in this case, a 3% tax solely on cinema entertainment was extended some five years later to all forms of entertainment. This raises at least two factual

questions: (1) was city council incorrect in deciding five years ago that cinema entertainment was peculiarly burdensome to the city?; or (2) have other forms of entertainment become, in the last five years, more burdensome upon the city than they were previously? These questions stand, in the present state of the evidence, unanswered.

In view of the foregoing, summary judgment is awarded plaintiff as to plaintiff's claims for the period commencing October 1, 1984. It is denied as to plaintiff's claims for the period January 1, 1979, to, but excluding, October 1, 1984.

This matter is scheduled for formal pre-trial on February 26, 1985, 1:30 p.m. at or before which time counsel shall present the appropriate entry, properly endorsed, incorporating by reference the foregoing opinion.

Sincerely,

/s/ THOMAS H. CRUSH,
Judge

THC:js

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A8405635
(Judge Crush)

NATIONAL AMUSEMENTS, INC.,
200 Elm Street,
Dedham, Massachusetts 02026,

Plaintiff,

v.

CITY OF SPRINGDALE,
11105 Lawnview Avenue,
Springdale, Ohio 45246

and

DOYLE H. WEBSTER, Clerk-Treasurer,
City of Springdale
12105 Lawnview Avenue
Springdale, Ohio 45246,

Defendants.

AMENDED COMPLAINT
(Filed January 9, 1985)

1. Plaintiff is a corporation incorporated under the laws of the State of Maryland and having its principal place of business in Dedham, Massachusetts. Plaintiff is the owner of several cinema theatres in the City of Springdale, Ohio.

2. On November 15, 1978, the Council of the City of Springdale, Ohio passed a cinema admission tax ordinance codified and hereinafter referred to as Chapter 97 of the Code of the City of Springdale. The tax provisions of said ordinance became effective on January 1, 1979. A copy thereof is attached hereto as Exhibit A and incorporated by reference.

3. Said ordinance imposes a tax of 3% on amounts received for admission to any cinema in the City of Springdale.

4. Said ordinance does not impose any tax on amounts received for admission to any other place of business, amusement or recreation in the City of Springdale. Some of the establishments located in the City of Springdale which are not subject to the admissions tax, are: Springdale Music Palace, 400 Yorkhaven Road; Sheri's Restaurant & Cocktail Lounge, 11911 Sheraton Lane; Showbiz Pizza Place, 11340 Princeton Road. These establishments all furnish entertainment, and entertainment is their primary purpose. Other such establishments may also exist.

5. Defendant, the City of Springdale, acting through its agent, the defendant, Doyle H. Webster, Clerk-Treasurer of the City of Springdale, has assessed and collected the aforesaid cinema admission tax in accordance with the provisions of Chapter 97 of the Code of the City of Springdale and continues to do so.

6. Chapter 97 of the Code of the City of Springdale, as applied, deprives plaintiff of its property without due process of law and denies it equal protection of the laws by virtue of the fact that it imposes no tax on other businesses whose primary purpose is entertaining, thereby violating Sections 1, 2, 16, and 19 of Article I of the Ohio Constitution as well as the Fourteenth Amendment of the Constitution of the United States of America.

7. Article I, Section 2 of the Ohio Constitution guarantees equal protection of the laws. The aforesaid ordinance violates Section 2 of Article I of the Ohio Constitution, as well as the Fourteenth Amendment of the Constitution of the United States of America, in that, as it is applied, it imposes a discriminatory tax upon cinemas in the City of Springdale, and does not place an admission tax on any other place of business, amusement, or recreation in the City of Springdale.

8. Chapter 97 of the Code of the City of Springdale, as applied, deprives plaintiff its rights to freedom of speech and of expression, thereby violating Section 2 of Article I of the

Ohio Constitution and the First Amendment of the Constitution of the United States of America.

9. Chapter 97 of the Code of the City of Springdale, is arbitrary and discriminatory as applied to cinemas within the City of Springdale in that it deprives and will continue to deprive them of the ability to compete in the market place with other forms of business and amusement within the City of Springdale, which are not subject to the aforesaid tax.

10. Compliance with the provisions of Chapter 97 of the Code of the City of Springdale has increased and will continue to increase plaintiff's operating costs and, hence, the consumer's cost of patronizing plaintiff's cinemas. Such increase has inhibited patronage, has caused a loss of profits to plaintiff, and will continue to do so.

11. The taxes paid by plaintiff pursuant to Chapter 97 of the Code of the City of Springdale constituted an unlawful deprivation of property without due process of law and a denial of equal protection of the laws by virtue of the fact that this ordinance imposes no tax on similar establishments whose primary purpose is the furnishing of entertainment.

12. Chapter 97 of the Code of the City of Springdale has, therefore, unconstitutionally deprived plaintiff of property, and no future revision of this ordinance can remedy the damage already suffered by plaintiff.

WHEREFORE, plaintiff prays that the Court enter a declaratory judgment pursuant to Rule 57, Ohio Rules of Civil Procedure, declaring that Chapter 97 of the Code of the City of Springdale is void and unenforceable as applied to plaintiff, and that plaintiff is not required to collect, report, or remit the tax levied by said ordinance, nor is it subject to interest or penalty charges, civil or criminal for failure to do so. Plaintiff further prays that, upon final adjudication that Chapter 97 of the Code of the City of Springdale is unconstitutional as applied to plaintiff, the defendants be permanently enjoined from requiring collection, reporting, or remission of the aforesaid admission tax as provided by Chapter 97 of the Code of the City of Springdale, and be re-

quired to remit to plaintiff all taxes it has paid to date pursuant to said ordinance.

STRAUSS, TROY AND
RUEHLMANN CO., L.P.A.

/s/ CHARLES G. ATKINS (A038)
Trial Attorney for Plaintiff
2100 Central Trust Center
Cincinnati, Ohio 45202
(513) 621-2120

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Amended Complaint was served by ordinary U.S. Mail, first class postage prepaid, on Albert H. Neman, Esq., 900 Tri-State Building, Cincinnati, Ohio 45202 on the ____ day of January, 1985.

Charles G. Atkins
Trial Attorney for Plaintiff

NATIONAL AMUSEMENTS, INC., APPELLANT, *v.*
CITY OF SPRINGDALE ET AL., APPELLEES.*

[Cite as National Amusements, Inc. *v.* Springdale (1981), 3 Ohio App. 3d 70.]

Municipal corporations — Three percent municipal cimena admission tax — Not discriminatory.

O.Jur 2d Taxation §§ 65, 66.

1. Broad power is conferred on the legislative authority to classify property for taxation, and no classification will be set aside unless it is so discriminatory as to deny equal protection of the law.

2. A classification, even though discriminating between entities subject to taxation, does not violate equal protection guarantees if there exists any state of facts that reasonably can be conceived to constitute a validating distinction from other taxable entities.

(No. C-800842—Decided November 18, 1981.)

APPEAL: Court of Appeals for Hamilton County.

Strauss, Troy & Ruehlmann Co., L.P.A., Mr. Charles G. Atkins and *Mr. Charles J. Postow*, for appellant.

Messrs. Wood, Lamping, Slutz & Reckman, Mr. Kenneth J. Schneider, Mr. Albert H. Neman and *Mr. Harold G. Korbee*, for appellees.

BLACK, P.J. The question presented in this appeal is whether Springdale's ordinance imposing a three percent cinema admissions tax is facially invalid because it denies equal protection rights guaranteed by the United States and Ohio Constitutions. We answer that question in the negative and affirm the trial court's judgment.

Defendant-appellee, city of Springdale, imposed the tax on "the amounts received from admission to any cinema" in the

* Reporter's Note: A motion to certify the record to the Supreme Court of Ohio was overruled on February 17, 1982 (case No. 82-42).

city, by adoption of Ordinance No. 67-1978 (enacting as of January 1, 1979, Chapter 97 of the city's codified ordinances). In the single "whereas" clause the city expressed its desire "to offset the cost of additional municipal services and to provide additional revenue," and in Section 97.02 the stated purpose of the tax was to provide revenue for general municipal purposes.

Plaintiff-appellant, National Amusements, Inc., brought suit asking that the ordinance be declared unconstitutional as violative of its equal protection rights and that enforcement be enjoined, claiming that the ordinance imposed a discriminatory tax on cinemas and not on "any other place of business, amusement or recreation in the City of Springdale." These allegations present solely the question of whether the ordinance is facially unconstitutional, there being no claim of discriminatory application. The city counterclaimed, asking for a judgment declaring the ordinance valid in all respects. Both parties moved for summary judgment, and the court ruled in favor of the city, declaring the ordinance valid.[1]

In the first of its two assignments of error, plaintiff asserts error in granting summary judgment when there existed a genuine issue of material fact. This claim has no merit. Plaintiff's complaint, as noted, raised only the question of whether the ordinance was invalid on its face. The city conceded the ordinance had been duly adopted. There could be no factual dispute material to the issue of facial validity.

If plaintiff had presented in its complaint, or in any evidentiary documentation associated with its motion for summary judgment, any claim that other forms of entertainment ex-

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[1] The motions for summary judgment were made on the basis of the pleadings only, without any other factual documentation, and the judgment entry states that the ordinance is "valid, lawful and enforceable." The entry also "dismisses" the plaintiff's complaint — a questionable result when both the complaint and the counterclaim presented a proper question for declaratory judgment. The propriety of a dismissal under these circumstances was not raised by the appellant, but we do not wish our affirmance of the judgment below to be deemed an approval of this aspect of the judgment entry below.

isted in the city so that the application of the tax on cinemas only would be impermissibly discriminatory, a factual dispute might arise. Plaintiff made no such claim, and no factual issues were presented to the trial court. We find no error as claimed.

The second assignment claims that the court erred in holding that the ordinance was facially valid. We understand plaintiff to concede that broad powers are conferred on a legislative authority to classify property for taxation, and that no classification will be set aside unless it is so discriminatory as to deny equal protection of the law. *State, ex rel. Struble,* v. *Davis* (1937), 132 Ohio St. 555 [8 O.O. 552], paragraph two of the syllabus. We understand plaintiff does not assert that the taxation of cinema admission has been preempted by the state of Ohio. Plaintiff's complaint, according to our understanding, is that the ordinance *sub judice* makes an invalid classification because it arbitrarily singles out cinema admissions for taxation. We do not agree.

A taxing authority may discriminate between trades and activities and is not required to follow any predetermined method of classifying those which it selects for taxation, provided the classification rests "upon some ground of difference having a fair and substantial relation to the object of the legislation * * *." *F. S. Royster Guano Co.* v. *Virginia* (1920), 253 U.S. 412, 415.

"* * * If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of differences or policy, there is no denial of the equal protection of the law. * * *" *Brown-Foreman Co.* v. *Kentucky* (1910), 217 U.S. 563, 573. Furthermore, a classification, even though discriminating between entities subject to taxation, does not violate equal protection guarantees if there exists any state of facts that reasonably can be conceived to constitute a validating distinction from other taxable entities. *Allied Stores of Ohio, Inc.* v. *Bowers* (1959), 358 U.S. 522, 528, 530 [9 O.O.2d 321]. Accord, *Towne Properties, Inc.* v. *Fairfield* (1977), 50 Ohio St. 2d 356 [4 O.O.3d 488]. In our judgment, the attraction of large masses of people to cinemas can

reasonably be conceived of as requiring such additional governmental services in off-hours that a tax designed to offset the cost thereof is substantially related to a governmental purpose.[2] We find no denial of equal protection. The second assignment of error has no merit.

We affirm.

Judgment affirmed.

SHANNON and PALMER, JJ., concur.

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[2] A tax on leases of motion picture films imposed on theaters but not on television stations has been held valid, the distinction being based on reality and not shown to be arbitrary or unreasonable. *Bullock* v. *ABC Interstate Theatres, Inc.* (Tex. Civ. App. 1977), 557 S.W.2d 337, certiorari denied (1978), 439 U.S. 894. A tax on the gross sales of motion picture theater tickets was also validated in *State, ex rel. Griffin*, v. *Greene* (1937), 104 Mt. 460, 67 P.2d 995.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A7811145

NATIONAL AMUSEMENTS, INC.,
Plaintiff,

v.

CITY OF SPRINGDALE
and
DOYLE H. WEBSTER, Clerk-Treasurer,
City of Springdale
Defendants.

JUDGMENT ENTRY
(Entered Nov. 14, 1980)

This cause came on for hearing on the complaint, the answer and counterclaim for declaratory judgment filed by the defendant, the defendant's motion for summary judgment, the memoranda and upon oral argument. It is the finding of the Court that Ordinance No. 67-1978 of the City of Springdale enacting Chapter 97 of the Codified Ordinances of the City of Springdale is not unreasonable and arbitrary. Accordingly, the Court orders that the complaint herein be DISMISSED at the plaintiff's costs.

The Court enters judgment on the defendant's counterclaim and declares Chapter 97 of the Codified Ordinances of the City of Springdale, Ohio to be valid, lawful and enforceable.

STRAUSS, TROY & RUEHLMAN
By /s/ Charles G. Atkins
Attorneys for the Plaintiff

WOOD, LAMPING, SLUTZ & RECKMAN
By /s/ Albert H. Neman
Attorneys for the Defendants

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A7811145

NATIONAL AMUSEMENTS, INC.,
31 St. James Avenue,
Boston, Massachusetts 02116,

Plaintiff,

v.

CITY OF SPRINGDALE,
12105 Lawnview Avenue,
Springdale, Ohio 45246
and
DOYLE H. WEBSTER, Clerk-Treasurer,
City of Springdale
12105 Lawnview Avenue
Springdale, Ohio 45246,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

1. Plaintiff is a corporation incorporated under the laws of the State of Maryland and having its principal place of business in Boston, Massachusetts. Plaintiff is the owner of several cinema theatres in the City of Springdale, Ohio.

2. On November 15, 1978, the Council of the City of Springdale, Ohio passed a cinema admission tax ordinance codified and hereinafter referred to as Chapter 97 of the Code of the City of Springdale. The tax provisions of said ordinance become effective on January 1, 1979. A copy thereof is attached hereto as Exhibit A and incorporated by reference.

3. Said ordinance imposes a tax of 3% on amounts received for admission to any cinema in the City of Springdale.

4. Said ordinance does not impose any tax on amounts

received for admission to any other place of business, amusement or recreation in the City of Springdale.

5. Defendant, the City of Springdale, acting through its agent, the defendant, Doyle H. Webster, Clerk-Treasurer of the City of Springdale, intends to assess and collect the aforesaid cinema admission tax in accordance with the provisions of Chapter 97 of the Code of the City of Springdale.

6. Chapter 97 of the Code of the City of Springdale deprives plaintiff of its property without due process of law and denies it equal protection of the laws, thereby violating Sections 1, 2, 16, and 19 of Article I of the Ohio Constitution as well as the Fourteenth Amendment of the Constitution of the United States of America.

7. Article I, Section 1 of the Ohio Constitution guarantees the right to acquire, possess, and protect property. Section 19 guarantees that private property shall be held inviolate, but subservient to the public welfare. Article 16 guarantees the protection of due process under state law for private property. The aforesaid ordinance violates Sections 1, 16, and 19 of Article I of the Ohio Constitution, as well as the Fourteenth Amendment of the Constitution of the United States of America, in that it is both arbitrary and unreasonable.

8. Article I, Section 2 of the Ohio Constitution guarantees equal protection of the laws. The aforesaid ordinance violates Section 2 of Article I of the Ohio Constitution, as well as the Fourteenth Amendment of the Constitution of the United States of America, in that it imposes a discriminatory tax upon cinemas in the City of Springdale, and does not place an admission tax on any other place of business, amusement, or recreation in the City of Springdale.

9. Section 97.05 of the aforesaid ordinance purports to impose a license fee upon every person desiring to operate a cinema within the City of Springdale. Section 97.15 of the aforesaid ordinance provides that all moneys received under the provisions of Chapter 97 shall be credited to the general fund of the City. Said license fee is unconstitutional in that it does not bear a reasonable relation to the burden imposed by

the activity being licensed and by the licensing process itself upon the governmental entity involved.

10. Chapter 97 of the Code of the City of Springdale, is arbitrary and discriminatory as to cinemas within the City of Springdale in that it deprives them of the ability to compete in the market place with other forms of business and amusement within the City of Springdale and also with cinemas outside the boundaries of the City of Springdale, which are not subject to the aforesaid tax.

11. Compliance with the provisions of Chapter 97 of the Code of the City of Springdale will inevitably increase plaintiff's operating costs and, hence, the consumer's cost of patronizing plaintiff's cinemas. Such increase will tend to inhibit patronage and will cause a loss of profits to plaintiff in a presently unascertainable amount.

WHEREFORE, plaintiff prays that the Court enter a declaratory judgment pursuant to Rule 57, Ohio Rules of Civil Procedure, declaring that Chapter 97 of the Code of the City of Springdale is void and unenforceable, and that plaintiff is not required to collect, report, or remit the tax levied by said ordinance, nor is it subject to interest or penalty charges, civil or criminal for failure to do so. Plaintiff further prays that, upon final adjudication that Chapter 97 of the Code of the City of Springdale is unconstitutional, the defendants be permanently enjoined from requiring collection, reporting, or remission of the aforesaid admission tax as provided by Chapter 97 of the Code of the City of Springdale.

STRAUSS, TROY AND
RUEHLMANN CO., L.P.A.

/s/ CHARLES G. ATKINS
Trial Attorney for Plaintiff
1800 First National Bank Building
Cincinnati, Ohio 45202
513 621-2120

OF COUNSEL

James F. McDaniel
Strauss, Troy and Ruehlmann Co., L.P.A.

TO THE CLERK:

In addition to serving the named defendants, please serve the Attorney General for the State of Ohio at the following address:

Attorney General
State of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43215

STRAUSS, TROY AND
RUEHLMANN CO., L.P.A.
/s/ JAMES F. McDANIEL

CHAPTER 97 OF CODIFIED ORDINANCES OF THE CITY OF SPRINGDALE, OHIO

ORDINANCE NO. 67-1978

AN ORDINANCE ENACTING SECTIONS 97.01 THROUGH 97.15 CONSTITUTING CHAPTER 97 OF THE CODIFIED ORDINANCES IMPOSING A CINEMA ADMISSION TAX

WHEREAS, the City of Springdale, Ohio desires to offset the cost of additional municipal services and to provide additional revenue by the levy of a tax of three percent on the amounts received for admission to any cinema in the City of Springdale.

NOW, THEREFORE, BE IT ORDAINED by the Council of the Municipality of Springdale, Ohio six members elected thereto concurring:

Section 1. That Sections 97.01 through 97.15 which shall constitute Chapter 97 under the heading "Cinema Admission Tax" are enacted and to be read as follows:

Sec. 97.01 **Definitions.**

Except where the context otherwise requires, the definitions given in this section govern the construction of this chapter.

(a) "Admission" shall include seats, chairs, tables, benches and spaces, reserved or otherwise, and other similar accomodations and charges made therefor.

(b) "Amounts received for admission" shall be deemed to exclude any city or federal taxes paid or received in respect of such admission.

(c) "Person" means any individual, firm, partnership, joint venture, association, social club, fraternal organization, joint stock company, corporation, estate, trust, business trust, receiver, trustee, syndicate, or any other group or combination acting as a unit.

(d) "Clerk-Treasurer" means the Clerk of the City of

Springdale who has the final authority for administering the Cinema Admission Tax.

(e) "Tax Commissioner" means the Tax Commissioner of the City of Springdale, as agent for the Clerk-Treasurer in administering the Cinema Admission Tax.

(f) "Cinema" means any theatre or establishment where moving pictures or movies are shown. Each separate screen is considered a separate cinema.

(g) "Operator" means the person who is proprietor of the cinema, whether in the capacity of owner, lessee, mortgagee in possession, licensee, or any other capacity. Where the operator performs his functions through a managing agent of any type or character other than an employee, the managing agent shall also be deemed an operator for the purpose of this chapter and shall have the same duties and liabilities as his principal. Compliance with the provisions of this chapter by either the principal or the managing agent shall, however, be considered to be compliance by both.

(h) "City" shall mean the city of Springdale, Ohio.

(i) "Board of Review" means the same Board of Review created and constituted under Section 94.17 of this code.

Sec. 97.02 **Rate of Tax.**

Commencing on January 1, 1979, for the purpose of providing revenue for the purposes of general municipal operations, maintenance, new equipment, extension and enlargement of municipal services and facilities, and capital improvements by the City, there is hereby levied a tax of three percentum (3%) on the amounts received for admission to any cinema in the City of Springdale, said tax to be known as the Cinema Admission Tax.

Sec. 97.03 **Exemptions.**

No tax shall be imposed under this chapter.

(a) Upon "amounts received for admissions" not within the taxing power of the city under the constitution or laws of Ohio or the United States;

(b) Upon any amount received for admission to any cinema all the proceeds of which inure exclusively to the benefit of religious, educational, or charitable institutions, societies, or community service organizations, if no part of the net earnings thereof inure to the benefit of any private stockholder or individual.

No exemption claimed under paragraphs (a), or (b), of this section shall be granted except upon a claim therefore [sic] made at the time the amount received for admission is collected and under penalty of perjury upon a form prescribed by the tax commissioner.

Sec. 97.04 **Price to be Marked on Ticket.**

The price, inclusive of any federal and city tax, at which every admission ticket or card is sold shall be conspicuously and indelibly printed, stamped or written on the face or back of that part of the ticket which is to be taken up by the management of the cinema.

Sec. 97.05 **License Required; Application; Contents; Fee; Issuance; Restrictions; Renewal; Suspension or Revocation; Liability of Owner of Premises; Exemptions.**

On and after January 1, 1979, no person shall continue to operate or thereafter begin to operate any cinema at any permanent or temporary place within the City of Springdale without a license therefor, as hereinafter provided.

Every person desiring to continue to operate or hereafter to begin to operate any such cinema at any permanent or temporary place within this city, shall file an application for a permanent or temporary license or licenses, as the case may be, with the Clerk-Treasurer. Every application for such license or licenses shall be made upon a form prescribed, prepared, and furnished by the Clerk-Treasurer, and shall set forth the name under which the applicant operates or intends to operate a cinema, whether the applicant conducts or intends to conduct a permanent or temporary cinema, the loca-

tion of the permanent or temporary cinema and such other information as the Clerk-Treasurer may require. If the applicant has or intends to have more than one cinema within the city, the application shall state the location of each cinema, and the number of the cinema, and in the case of a temporary cinema, the date and length of time such cinema is to be conducted at each place. In the case of an application for a license for a temporary cinema, the application shall state the name and address of the owner, or lessee, or custodian of the premises upon which such cinema is to be conducted, and any other information prescribed by the Clerk-Treasurer for the purposes of identification. The application shall be signed and verified by oath or affirmation by the person conducting the cinema if a natural person, or in the case of an association, by a member or partner thereof, or in the case of a corporation by an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority. At the time of making such application, the applicant shall pay to the Clerk-Treasurer a fee of Five dollars ($5.00) for each license. A license is required for each separate cinema.

Upon approval of the application and payment of any license fee or fees therein required, the Clerk-Treasurer shall grant and issue to each applicant (unless withheld for a cause) a permanent or temporary cinema license for each cinema within the city set forth in his application.

A cinema license shall be valid only for the person in whose name it is issued and for the opration of a cinema at the place designated therein and shall not be assignable. It shall be conspicuously displayed at the place for which issued during the period of ticket sale and operation of the cinema. All licenses for permanent cinemas shall be for a period of twelve (12) months following the date upon which they are issued, unless sooner surrendered by the licensee, or suspended or revoked for cause by the Clerk-Treasurer. Licenses for temporary cinemas shall expire at the time specified therein.

Licenses issued for permanent cinemas under the provisions of this chapter may be renewed annually upon application

made to the Clerk-Treasurer and the payment of a renewal fee of Five Dollars ($5.00).

The Clerk-Treasurer may suspend or after hearing revoke a cinema license whenever he finds that the holder thereof has failed to comply with any of the provisions of this chapter. Upon suspending or revoking any cinema license the Clerk-Treasurer shall require the holder thereof to surrender to him immediately all licenses or duplicates thereof issued to such holder, and the holder shall surrender promptly all such licenses to the Clerk-Treasurer as required. Whenever the Clerk-Treasurer suspends a cinema license, he shall notify the holder immediately and afford him a hearing, if no hearing has already been afforded and one is desired. After such hearing the Clerk-Treasurer shall either rescind his order of suspension or upon good cause appearing therefor shall continue the suspension or revoke the license.

No owner, lessee or custodian of the premises upon which a cinema is to be operated, shall lease, or permit the same to be used by any person who is not the owner of a license duly issued by any person who is not the owner of a license duly issued by the Clerk-Treasurer hereunder. Any such owner, lessee or custodian who leases to or permits such premises to be used for such purpose, to a person who is not the owner of a license duly issued hereunder, shall be liable for the amount of taxes levied under the provisions of this chapter in connection with any cinema so conducted upon such premises, and such taxes shall be a lien upon such premises.

When an exemption from the payment of the cinema admission tax is granted by the Clerk-Treasurer for a given organization in accordance with the provision of Section 97.03, such exemption shall be considered as the equivalent of the license herein provided for.

Sec. 97.06 **Reporting and Remitting.**

(a) Each operator shall, on or before the last day of the month following the close of each calendar quarter, or at the close of any shorter reporting period which may be estab-

lished by the tax commissioner, make a return to the tax commissioner, on forms obtainable from him, of the total admissions charged and received and the amount of tax collected for the same. Claims for exemption from the tax shall be filed with the report. At the time the return is filed, the full amount of the tax collected shall be remitted to the tax commissioner. The tax commissioner may establish shorter reporting periods for any licensee if he deems it necessary in order to insure collection of the tax and he may require further information in the return if such information is pertinent to the collection of the tax. All taxes collected by operators pursuant to this chapter shall be held in trust for the account of the city until payment thereof is made to the tax commissioner. All returns and payments submitted by each operator shall be treated as confidential by the tax commissioner and shall not be released by him except upon order of a court of competent jurisdiction or to an officer or agent of the United States, the state of Ohio, the county of Hamilton, or the City of Springdale for official use only. The nonavailability or failure to obtain forms shall not relieve an operator from timely paying such tax.

(b) No person, including any officer of a corporation or employee of a corporation having control or supervision of or charged with the responsibility of filing returns, shall fail to file any return or report required to be filed by this Chapter, or file or cause to be filed any incomplete, false or fraudulent return, report or statement or aid or abet another in the filing of any false or fraudulent return, report or statement.

(c) If any operator required to file quarterly returns under this Chapter fails, on two consecutive quarters within a twelve-month period, to file such returns when due or to pay the tax thereon, or if any operator authorized by the tax commissioner to file returns at less frequent intervals, fails on two or more occasions within a twenty-four month period, to file such returns when due or to pay the tax due thereon, the tax commissioner may require such operator to furnish security in an amount equal to the average tax liability of the operator for a period of one year, as determined by the tax commis-

sioner from a review of returns or other information pertaining to such operator which amount shall in no event be less than One Hundred Dollars ($100.00). Such security may be in the form of an advance tax payment to be applied to pay the tax due on subsequent returns, or a corporate surety bond, satisfactory to the tax commissioner, conditioned upon payment of the tax due with the returns from the operator. Such security must be filed within ten days following the operator's receipt of the notice from the tax commissioner of its requirements. A corporate surety bond filed under this section shall be returned to the operator if, for a period of twelve consecutive months following the date the bond was filed, the operator has filed all returns and remitted payment therewith within the time prescribed in this Chapter.

(d) If any operator required to file returns and to remit the tax due to the City under the provisions of this Chapter, fails for any reason to make such filing or payment, any of its officers or employees having control or supervision of or charged with the responsibility of filing returns and making payments, shall be personally liable for such failure. The dissolution of a corporation shall not discharge an officer's or employee's liability for a prior failure of the corporation to file returns or remit tax due. The sum due for such liability may be collected by assessment in the manner provided in this chapter.

Sec. 97.07 **Penalties and Interest.**

(a) **Original Delinquency.** Any operator who fails to remit any tax imposed by this chapter within the time required shall pay a penalty equal to ten per cent (10%) of the amount of the tax, in addition to the tax.

(b) **Continued Delinquency.** Any operator who fails to remit any delinquent remittance on or before a period of thirty (30) days following the date on which the remittance first became delinquent shall pay a second delinquency penalty equal to ten per cent (10%) of the amount of the tax and previous penalty in addition to the tax and the ten per cent

(10%) penalty first imposed. An additional penalty equal to 10% of the total tax and penalty of the previous 30-day period shall be added for each successive 30-day period that the account remains delinquent.

(c) **Fraud.** If the tax commissioner determines that the non-payment of any remittance due under this ordinance is due to fraud, a penalty equal to twenty-five per cent (25%) of the amount of the tax shall be added thereto in addition to the penalties stated in subsections (a) and (b) of this section.

(d) **Interest.** In addition to the penalties imposed, any operator who fails to remit the tax imposed by this chapter shall pay interest at the rate of 1% per month, or fraction thereof, on the amount of the tax, exclusive of penalties, from the date on which the remittance first became delinquent until paid.

(e) **Penalties During Pendency of Hearing or Appeal.** No penalty provided under the terms of this chapter shall be imposed during the pendency of any hearing provided for in Section 97.08 of this chapter nor during the pendency of any appeal to the tax commissioner provided for in Section 97.09 of this chapter.

Sec. 97.08 **Failure to Collect and Report Tax, Determination of Tax by Tax Commissioner.**

If any operator shall fail or refuse to collect said tax and to make, within the time provided in this chapter, any report and remittance of said tax or any portion thereof required by this chapter, the tax commissioner shall proceed in such manner as he may deem best to obtain facts and information on which to base his estimate of the tax due. As soon as the tax commissioner shall procure such facts and information as he is able to obtain upon which to base the assessment of any tax imposed by this chapter and payable to any operator who has failed or refused to collect the same and to make such report and remittance, he shall proceed to determine and assess against such operator the tax, interest and penalties provided for by this chapter. In case such determination is made, the

tax commissioner shall give a notice of the amount so assessed by serving it personally or by depositing it in the United States mail, postage prepaid, addressed to the operator so assessed at his last known address. Such operator may within ten (10) days after the serving or mailing of such notice make application in writing to the tax commissioner for a hearing on the amount assessed. If application by the operator for a hearing is not made within the time prescribed, the tax, interest and penalties, if any, determined by the tax commissioner shall become final and conclusive and immediately due and payable. If such application is made, the tax commissioner shall give not less than five (5) days written notice in the manner prescribed herein to the operator to show cause at a time and place fixed in said notice why said amounts specified therein should not be fixed for such tax, interest and penalties. At such hearing, the operator may appear and offer evidence why such specified tax, interest and penalties should not be so fixed. After such hearing, the tax commissioner shall determine the proper tax to be remitted and shall thereafter give written notice to the person in the manner prescribed herein of the determination and the amount of such tax, interest and penalty. The amount determined to be due shall be payable after thirty (30) days unless an appeal is taken as provided in Section 97.09. Subject to the policies laid down by the Board of Review, the tax commissioner shall have the power to compromise any assessment of interest and penalties.

Sec. 97.09 **Appeal.**

Any operator aggrieved by any decision of the tax commissioner with respect to the amount of such tax, interest and penalties, if any, may appeal to the Board of Review as created and constituted under Section 94.17 of this code by filing a notice of appeal with the Board of Review within thirty (30) days of the serving or mailing of the determination of tax due. The Board of Review shall fix a time and place for hearing such appeal, and shall give notice in writing to such

operator at his last known resident address. The findings of the Board of Review shall be final and conclusive and shall be served upon the appellant in the manner prescribed above for service of notice of hearing. Any amount found to be due shall be immediately due and payable upon the service of notice.

Sec. 97.10. **Records.**

(a) It shall be the duty of every operator liable for the collection and payment to the City of any tax imposed by this ordinance to keep and preserve such records or receipts, issuance of complimentary tickets, and otherwise, together with the ticket stubs and other pertinent documents in such form as the Clerk-Treasurer may require. If the operator furnishes admissions not subject to the tax, the operator's records shall show the nature of the transaction.

(b) All such records and other documents shall be open during business hours to the inspection of the tax commissioner and shall be preserved for a period of four (4) years, unless the tax commissioner in writing, consents to their destruction within that period, or by order requires that they be kept longer.

Sec. 97.11 **Refunds.**

(a) Whenever the amount of any tax, interest or penalty has been overpaid or paid more than once or has been erroneously or illegally collected or received by the city under this chapter, it may be refunded provided a claim in writing therefor, stating under penalty of perjury the specific grounds upon which the claim is founded, is filed with the tax commissioner within three years of the date of payment. The claim shall be on forms furnished by the tax commissioner. The tax commissioner may determine the amount of any such erroneous or over payment.

(b) No refund shall be paid under the provisions of this section unless the claimant establishes his right thereto by

written records showing entitlement thereto and such refund exceeds One Dollar ($1.00).

Sec. 97.12 **Taxes Made a Lien.**

The taxes imposed by this chapter shall be a lien upon all of the property of any person required to collect and pay or to pay the same. If he shall sell out his business or shall quit business, such person shall be required to make out the return provided for under this chapter within thirty (30) days after the date of sale of such business, or retirement therefrom, and his successor in business shall be required to withhold a sufficient amount of the purchase money to cover the amount of said taxes so collected and unpaid, together with interest, if any, until such time as the former owner shall produce a receipt from the treasurer showing that the taxes have been paid, or a certificate that no taxes are due.

If the purchaser of a business shall fail to withhold purchase money as above provided, and the taxes so collected shall be due and unpaid after the thirty (30) day period allowed, he shall be liable for the payment of the taxes collected and unpaid on account of the operation of the business by the former owner, together with interest, as provided by this chapter.

The lien for unpaid taxes herein imposed shall not become effective until such time as the Clerk-Treasurer shall certify to the county auditor of Hamilton county the amount of taxes delinquent, and such certification is placed on record by the county recorder of said county in a book maintained for that purpose.

Sec. 97.13 **Violations; Misdemeanor.**

Any person violating any of the provisions of this chapter shall be guilty of a minor misdemeanor on the first offense and on any subsequent offense shall be guilty of a misdemeanor of the second degree punishable therefor by a fine of not more than Seven Hundred Fifty Dollars ($750.00) or by

imprisonment for a period of not more than ninety (90) days or by both such fine and imprisonment for each offense.

Sec. 97.14 **Separability.**

If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this chapter or any part thereof is for any reason held to be unconstitutional, such decision shall not affect the validity of the remainder portions of this chapter or any part thereof. The Council of the City of Springdale hereby declares that it would have passed each section, subsection, subdivision, paragraph, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, subdivisions, paragraphs, sentences, clauses or phrases be declared unconstitutional.

Sec. 97.15 **Moneys Received, Where Credited.**

The moneys received under the provisions of this Chapter shall be credited to the general fund of the City.

Section 2. That this ordinance shall take effect and be in force from and after the earliest period allowed by law.

Passed this 15th day of November, 1978.

/s/ VERNON P. FRENCH
President of Council

ATTEST:
Doyle H. Webster, Clerk

APPROVED:
/s/ RAYMOND R. JOHNSON
Mayor
Dated: November 15, 1978

CHAPTER 98 OF CODIFIED ORDINANCES OF THE CITY OF SPRINGDALE, OHIO

CHAPTER 98: ENTERTAINMENT ADMISSION TAX

§ 98.01 DEFINITIONS.

For the purpose of this chapter the following definitions shall apply unless the context clearly indicated or requires a different meaning.

(A) "**ADMISSION.**" Includes any charge for entering the premises when entertainment of any type or variety is performed except cinemas which are provided for separately in this Code. This would include an admission fee, cover charge, minimum fee or any similarly titled fee required to be paid whether or not other expenditures are made on the premises.

(B) "**AMOUNTS RECEIVED FOR ADMISSION.**" Excludes any city or federal taxes paid or received in respect of such admission.

(C) "**BOARD OF REVIEW.**" The "**BOARD OF REVIEW**" created and constituted under § 94.17.

(D) "**CLERK-TREASURER.**" The City Clerk who has the final authority for administering the entertainment admission tax.

(E) "**ENTERTAINMENT.**" Any performance by an individual, group, or otherwise including, but not limited to, stage shows, musical entertainment, circuses, carnivals, displays, exhibits, exhibitions, and demonstrations. Each separate location is considered a separate entertainment.

(F) "**OPERATOR.**" The person who is proprietor of the entertainment location, whether in the capacity of owner, lessee, mortgagee in possession, licensee, or any other capacity. Where the "**OPERATOR**" performs his functions through a managing agent of any type or character other than an employee, the managing agent shall also be deemed an "**OPERATOR**" for the purposes of this chapter, and shall have the same duties and liabilities as his principal. Com-

pliance with the provisions of this chapter by either the principal or the managing agent shall be considered to be compliance by both.

(G) **"TAX COMMISSIONER."** The **"TAX COMMISSIONER"** of the city, as agent for the Clerk-Treasurer in administering the entertainment admission tax.

§ 98.02 RATE OF TAX.

There is levied a tax of 3% on the amounts received for admission to any entertainment in the city, except cinemas which are provided for separately in this Code. Such tax to be known as the "entertainment admission tax." The tax is levied for the period commencing October 1, 1984, and shall be effective in subsequent periods unless revoked or amended. The purpose of the tax is to provide revenue for the purposes of general municipal operations, maintenance, new equipment, extention and enlargement of municipal services and facilities and capital improvements by the city.

§ 98.03 EXEMPTIONS.

(A) No tax shall be imposed under this chapter:

(1) On **"AMOUNTS RECEIVED FOR ADMISSIONS"** not within the taxing power of the city under the constitution or laws of Ohio or the United States;

(2) On any amount received for admission to any entertainment, all the proceeds of which inure exclusively to the benefit of religious, educational, or charitable institutions, societies, or community service organizations, if no part of the net earnings thereof inure to the benefit of any private stockholder or individual.

(B) No exemption claimed under (A)(1) or (2) above shall be granted except on a claim therefor made at the time the amount received for admission is collected, and under penalty of perjury on a form prescribed by the Tax Commissioner.

§ 98.04 PRICE TO BE MARKED ON TICKET.

The price, inclusive of any federal and city tax, at which

every admission ticket or card is sold shall be conspicuously and indelibly printed, stamped, or written on the face or back of that part of the ticket which is to be taken up by the management of the entertainment location.

§ 98.05 LICENSE REQUIRED.

(A) No person after the effective date of this section shall continue to operate or thereafter begin to operate any entertainment at any permanent or temporary place within the city without a license therefor, as hereinafter provided.

(B) Every person desiring to continue to operate or hereafter to begin to operate any such entertainment at any permanent or temporary place within this city shall file an application for a permanent or temporary license or licenses, as the case may be, with the Clerk-Treasurer. Every application for such license or licenses shall be made on a form prescribed, prepared, and furnished by the Clerk-Treasurer, and shall set forth the name under which the applicant operates or intends to operate an entertainment location, whether the applicant conducts or intends to conduct a permanent or temporary entertainment, the location of the permanent or temporary entertainment, and such other information as the Clerk-Treasurer may require. If the applicant has or intends to have more than one entertainment location within the city, the application shall state the location of each entertainment and the number of the entertainment location, and in the case of a temporary entertainment location, the date and length of time such entertainment is to be conducted at each place. In the case of an application for a license for a temporary entertainment location, the application shall state the name and address of the owner, lessee, or custodian of the premises on which such entertainment is to be conducted, and any other information prescribed by the Clerk-Treasurer for the purposes of identification.

(C) The application shall be signed and verified by oath or affirmation by the person conducting the entertainment if a natural person, or in the case of an association, by a member or partner thereof, or in the case of a corporation, by

an executive officer thereof or some person specifically authorized by the corporation to sign the application, to which shall be attached the written evidence of his authority. At the time of making such application, the applicant shall pay to the Clerk-Treasurer a fee of $5 for each license. A license is required for each separate entertainment location.

(D) On approval of the application and payment of any license fee or fees therein required, the Clerk-Treasurer shall grant and issue to each applicant (unless withheld for cause) a permanent or temporary entertainment admission license for each entertainment location within this city set forth in his application.

(E) An entertainment admission license shall be valid only for the person in whose name it is issued and for the operation of an entertainment location at the place designated therein, and shall not be assignable. It shall be conspicuously displayed at the place for which issued during the period of ticket sale and operation of the entertainment location. All licenses for permanent entertainment locations shall be for a period of 12 months following the date on which they are issued, unless sooner surrendered by the licensee or suspended or revoked for cause by the Clerk-Treasurer. Licenses for temporary entertainment locations shall expire at the time specified therein.

(F) Licenses issued for permanent entertainment location under the provisions of this chapter may be renewed annually on application made to the Clerk-Treasurer and the payment of a renewal fee of $5.

(G) The Clerk-Treasurer may suspend or after hearing revoke an entertainment admission license whenever he finds that the holder thereof has failed to comply with any of the provisions of this chapter. On suspending or revoking any entertainment admission license, the Clerk-Treasurer shall require the holder thereof to surrender to him immediately all licenses or duplicates thereof issued to such holder, and the holder shall surrender promptly all such licenses to the Clerk-Treasurer as required. Whenever the Clerk-Treasurer suspends an entertainment admission license, he shall notify the

holder immediately and afford him a hearing, if no hearing has already been afforded and one is desired. After such hearing the Clerk-Treasurer shall either rescind his order of suspension or, on good cause appearing therefor, continue the suspension or revoke the license.

(H) No owner, lessee, or custodian of the premises on which an entertainment is to be operated shall lease or permit the same to be used by any person who is not the owner of a license duly issued by the Clerk-Treasurer hereunder. Any such owner, lessee, or custodian who leases to or permits such premises to be used for such purpose by a person who is not the owner of a license duly issued hereunder shall be liable for the amount of taxes levied under the provisions of this chapter in connection with any entertainment so conducted on such premises, and such taxes shall be a lien on such premises.

(I) When an exemption from the payment of the entertainment admission tax is granted by the Clerk-Treasurer for a given organization in accordance with the provision of § 98.03, such exemption shall be considered as the equivalent of the license herein provided for.

§ 98.06 REPORTING AND REMITTING.

(A) Each operator shall, on or before the last day of the month following the close of each calendar quarter, or at the close of any shorter reporting period which may be established by the Tax Commissioner, make a return to the Tax Commissioner, on forms obtainable from him, of the total admissions charged and received and the amount of tax collected for the same. Claims for exemption from the tax shall be filed with the report. At the time the return is filed, the full amount of the tax collected shall be remitted to the Tax Commissioner. The Tax Commissioner may establish shorter reporting periods for any licensee if he deems it necessary in order to insure collection of the tax, and he may require further information in the return if such information is pertinent to the collection of the tax. All taxes collected by operators pursuant to this chapter shall be held in trust for the account

of the city until payment thereof is made to the Tax Commissioner. All returns and payments submitted by each operator shall be treated as confidential by the Tax Commissioner, and shall not be released by him except on order of a court of competent jurisdiction or to an officer or agent of the United States, the State of Ohio, the County of Hamilton, or the city for official use only. The nonavailability or failure to obtain forms shall not relieve an operator from timely paying such tax.

(B) No person, including any officer of a corporation or employee of a corporation having control or supervision of or charged with the responsibility of filing returns, shall fail to file or cause to be filed any incomplete, false, or fraudulent return, report, or statement, or aid or abet another in the filing of any false or fraudulent return, report, or statement.

(C) If any operator required to file quarterly returns under this chapter fails on two consecutive quarters within a 12-month period, to file such returns when due or to pay the tax thereon, or if any operator authorized by the Tax Commissioner to file returns at less frequent intervals, fails on two or more occasions within a 24-month period to file such returns when due or to pay the tax due thereon, the Tax Commissioner may require such operator to furnish security in an amount equal to the average tax liability of the operator for a period of one year, as determined by the Tax Commissioner from a review of returns or other information pertaining to such operator, which amount shall in no event be less than $100. Such security may be in the form of an advance tax payment to be applied to pay the tax due on subsequent returns or a corporate surety bond, satisfactory to the Tax Commissioner, conditioned on payment of the tax due with the returns from the operator. Such security must be filed within ten days following the operator's receipt of the notice from the Tax Commissioner of its requirements. A corporate surety bond filed under this section shall be returned to the operator if, for a period of 12 consecutive months following the date the bond was filed, the operator has filed all returns

and remitted payments therewith within the time prescribed in this chapter.

(D) If any operator required to file returns and to remit taxes due to the city under the provisions of this chapter fails for any reason to make such filing or payment, any of its officers or employees having control or supervision of or charged with the responsibility of filing returns and making payments shall be personally liable for such failure. The dissolution of a corporation shall not discharge an officer's or employee's liability for a prior failure of the corporation to file returns or remit tax due. The sum due for such liability may be collected by assessment in the manner provided in this chapter.

§ 98.07 PENALTIES AND INTEREST.

(A) Original delinquency. Any operator who fails to remit any tax imposed by this chapter within the time required shall pay a penalty equal to 10% of the amount of the tax, in addition to the tax.

(B) Continued delinquency. Any operator who fails to remit any delinquent remittance on or before a period of 30 days following the date on which the remittance first became delinquent shall pay a second delinquency penalty equal to 10% of the amount of the tax and previous penalty in addition to the tax and the 10% penalty first imposed. An additional penalty equal to 10% of the total tax and penalty of the previous 30-day period shall be added for each successive 30-day period that the account remains delinquent.

(C) Fraud. If the Tax Commissioner determines that the non-payment of any remittance due under this ordinance is due to fraud, a penalty equal to 25% of the amount of the tax shall be added thereto in addition to the penalties stated in (A) and (B) above.

(D) Interest. In addition to the penalties imposed, any operator who fails to remit any tax imposed by this chapter shall pay interest at the rate of 1% per month, or fraction thereof, on the amount of the tax, exclusive of penalties, from

the date on which the remittance first became delinquent until paid.

(E) Penalties during pendency of hearing or appeal. No penalty provided under the terms of this chapter shall be imposed during the pendency of any hearing provided for in § 98.08, nor during the pendency of any appeal to the Tax Commissioner provided for in § 98.09.

§ 98.08 FAILURE TO COLLECT AND REPORT TAX; DETERMINATION OF TAX BY TAX COMMISSIONER.

(A) If any operator shall fail or refuse to collect tax and to make, within the time provided in this chapter, any report and remittance of the tax or any portion thereof required by this chapter, the Tax Commissioner shall proceed in such manner as he may deem best to obtain facts and information on which to base his estimate of the tax due. As soon as the Tax Commissioner shall procure such facts and information as he is able to obtain on which to base the assessment of any tax imposed by this chapter payable by any operator who has failed or refused to collect the same and to make such report and remittance, he shall proceed to determine and assess against such operator the tax, interest, and penalties provided for by this chapter. In case such determination is made, the Tax Commissioner shall give a notice of the amount so assessed by serving it personally or by depositing it in the United States mail, postage prepaid, addressed to the operator so assessed at his last known address. Such operator may, within ten days after the serving or mailing of such notice, make application in writing to the Tax Commissioner for a hearing on the amount assessed. If application by the operator for a hearing is not made within the time prescribed, the tax, interest, and penalties, if any, determined by the Tax Commissioner shall become final and conclusive and immediately due and payable.

(B) If such application is made, the Tax Commissioner shall give not less than five days written notice in the manner

prescribed herein to the operator to show cause at a time and place fixed in such notice why the amount specified therein should not be fixed for such tax, interest, and penalties. At such hearing, the operator may appear and offer evidence why such specified tax, interest, and penalties should not be so fixed. After such hearing, the Tax Commissioner shall determine the proper tax to be remitted, and shall thereafter give written notice to the person in the manner prescribed herein of the determination and the amount of such tax, interest, and penalty. The amount determined to be due shall be payable after 30 days unless an appeal is taken as provided in § 98.09. Subject to the policies laid down by the Board of Review, the Tax Commissioner shall have the power to compromise any assessment of interest and penalties.

§ 98.09 APPEAL.

Any operator aggrieved by any decision of the Tax Commissioner with respect to the amount of such tax, interest, and penalties, if any, may appeal to the Board of Review as created and constituted under § 94.17 by filing a notice of appeal with the Board of Review within 30 days of the serving or mailing of the determination of tax due. The Board of Review shall fix a time and place for hearing such appeal, and shall give notice in writing to such operator at his last known resident address. The findings of the Board of Review shall be final and conclusive, and shall be served on the appellant in the manner prescribed above for service of notice of hearing. Any amount found to be due shall be immediately due and payable on service of the notice.

§ 98.10 RECORDS.

(A) It shall be the duty of every operator liable for the collection and payment to the city of any tax imposed by this chapter to keep and preserve such records or receipts, issuance of complimentary tickets, and otherwise, together with the ticket stubs and other pertinent documents in such form as the Clerk-Treasurer may require. If the operator fur-

nishes admissions not subject to the tax, the operator's records shall show the nature of the transaction.

(B) All such records and other documents shall be open during business hours to the inspection of the Tax Commissioner and shall be preserved for a period of four years, unless the Tax Commissioner consents in writing to their destruction within that period, or by order requires that they be kept longer.

§ 98.11 REFUNDS.

(A) Whenever the amount of any tax, interest, or penalty has been overpaid or paid more than once, or has been erroneously or illegally collected or received by the city under this chapter, it may be refunded, provided a claim in writing therefor, stating under penalty of perjury the specific grounds on which the claim is founded, is filed with the Tax Commissioner within three years of the date of payment. The claim shall be on forms furnished by the Tax Commissioner. The Tax Commissioner may determine the amount of any such erroneous or over payment.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Case No. A8707374

TRI-COUNTY CINEMAS, INC.
c/o U.S.A. CINEMAS
60 Temple Place
Boston, Massachusetts 02111
and
CINEMA INVESTMENTS, INC.
c/o U.S.A. CINEMAS
60 Temple Place
Boston, Massachusetts 02111

Plaintiffs,

vs.

CITY OF SPRINGDALE
12105 Lawnview Avenue
Springdale, Ohio 45246,
and
DOYLE H. WEBSTER,
Clerk-Treasurer
City of Springdale
12105 Lawnview Avenue
Cincinnati, Ohio 45246,

Defendants.

COMPLAINT TO ENJOIN TAX COLLECTION AND FOR DAMAGES
(Filed September 30, 1987)

1. Plaintiffs are corporations incorporated under the laws of the State of Ohio and having their principal places of business in Hamilton County, Ohio. Plaintiffs are the owners of cinema theatres operating in two locations in the City of Springdale, Ohio.

2. On November 15, 1978, the Council of the City of Springdale, Ohio passed a cinema admission tax ordinance codified and hereinafter referred to as Chapter 97 of the Code of the City of Springdale (the "Ordinance"). The tax provisions of said Ordinance became effective on January 1, 1979.

3. The Ordinance imposes a tax of 3% on amounts received for admission to any cinema in the City of Springdale.

4. The Ordinance does not impose tax on amounts received for admission to any other place of business, amusement, or recreation in the City of Springdale.

5. Several other establishments located in the City of Springdale furnish entertainment, and entertainment is their primary purpose and not subject to the Ordinance.

6. Defendant, the City of Springdale, acting through its agent, Defendant Doyle H. Webster, Clerk-Treasurer of the City of Springdale, has assessed and collected the aforesaid cinema admission tax in accordance with the provisions of Chapter 97 and continues to do so.

7. Chapter 97 of the Code of the City of Springdale, as applied to Plaintiffs, deprives Plaintiffs of their property without due process of law and denies them equal protection of the laws, thereby violating Sections 1, 2, 16 and 19 of Article 1 of the Ohio Constitution as well as the Fourteenth Amendment of the Constitution of the United States of America.

8. Article 1, Section 2 of the Ohio Constitution guarantees equal protection of the laws. The aforesaid ordinance as applied to Plaintiffs violates Section 2 of Article 1 of the Ohio Constitution, as well as the Fourteenth Amendment of the Constitution of the United States of America.

9. Chapter 97 of the Code of the City of Springdale, as applied, denies Plaintiffs their rights to freedom of speech and of expression, thereby violating Section 2 of Article 1 of the Ohio Constitution and the First Amendment of the Constitution of the United States of America.

10. Chapter 97 of the Code of the City of Springdale is arbitrary and discriminatory as applied to cinemas within the

City of Springdale in that it has deprived them of the ability to compete in the market place with other forms of business and amusement within the City of Springdale which are not or have not been subject to the aforesaid tax.

11. Compliance with the provisions of Chapter 97 of the Code of the City of Springdale has increased and will continue to increase Plaintiffs' operating costs, and hence, the consumer's cost of patronizing Plaintiffs' cinemas. Such increase has inhibited patronage, has caused a loss of profits to Plaintiffs, and will continue to do so.

12. The illegal taxes paid by Plaintiffs pursuant to Chapter 97 of the Code of the City of Springdale constitute an unlawful deprivation of property without due process of law and a denial of equal protection of the laws.

13. On June 3, 1987, this Court has held the Ordinance unconstitutional as applied to a cinema owner and operator in an identical position and situation with Plaintiffs, for the period 1978 to October, 1984, in Case No. A-84-05635, styled *National Amusement, Inc.* v. *City of Springdale.*

WHEREFORE, Plaintiffs pray that the Court declare that Chapter 97 of the Code of the City of Springdale is void and unenforceable as applied to Plaintiffs, and that Plaintiffs are not required to collect, report, or remit the tax levied by said Ordinance, nor are they subject to interest or penalty charges, civil or criminal, for failure to do so. Plaintiffs further pray that, upon final adjudication, Chapter 97 of the Code of the City of Springdale is unconstitutional as applied to Plaintiffs, the Defendants be permanently enjoined from requiring collection, reporting, or remission of the aforesaid admission tax as provided by Chapter 97 of the Code of the City of Springdale, and be required to remit to Plaintiffs all taxes paid to date pursuant to said Ordinance.

/s/ MICHAEL J. ZAVATSKY (Z-097)
Trial Attorney for Plaintiffs
Taft, Stettinius & Hollister
1800 First National Bank Center
Cincinnati, Ohio 45202
(513) 381-2838

Of Counsel:

Stephen M. Nechemias, Esq.
Taft, Stettinius & Hollister
1800 First National Bank Center
Cincinnati, Ohio 45202
(513) 381-2838

Samuel B. Bruskin, Esq.
Choate, Hall & Stewart
53 State Street
Boston, Massachusetts 02109
(617) 227-5020

(2)

No. 90-1047

In the Supreme Court of the United States

OCTOBER TERM, 1990

NATIONAL AMUSEMENTS, INC.,
Petitioner,

v.

CITY OF SPRINGDALE, et al.,,
Respondents.

ON WRIT OF CERTIORARI TO
THE OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAVID A. CALDWELL (*Counsel of Record*)
KENNETH J. SCHNEIDER
ALBERT H. NEMAN
2500 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202
Telephone (513) 852-6031
Attorneys for Respondents

RONALD CULP, BOX 26, WORTHINGTON, OHIO 43085 (614) 846-7025

COUNTER STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Is a judgment upholding the constitutionality of a cinema admissions tax res judicata so as to bar a second action between the same parties challenging the same tax where the taxpayer advances a different constitutional ground in the second action?

2. Is a municipal admissions tax constitutionally imposed on cinemas when the result is to tax cinema admissions in the same manner as other retail transactions and there is substantial evidence that cinemas create an exceptional burden on municipal services?

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No. 90-1047

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THE OHIO SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

COUNTER STATEMENT OF THE CASE

On November 15, 1978, the Council of the City of Springdale, Ohio, enacted Ordinance No. 67-1978 imposing a 3% tax on the admission price to any cinema in the city. National Amusements, Inc., the petitioner, is the owner and operator of Showcase Cinema, one of the three multi-screen cinemas located in the City.

Although Springdale is a relatively small suburb of Cincinnati, by reason of its location at the intersection of two interstate highways, it is a major retail area with a regional shopping center and several smaller shopping centers.

Other than the three cinemas, the only other place of entertainment charging admission, in 1978 and now, is the Boulevard Night Club. It has existed in Springdale since approximately 1972. Pursuant to Chapter 113 of the Springdale Code of Ordinances, the Boulevard has paid an annual license tax of $1000.00 every year since opening.

On December 28, 1978, plaintiff filed an action against Springdale and Doyle H. Webster, Clerk, in the Court of Common Pleas of Hamilton County, Ohio, under Docket No. A7811145. The complaint demanded declaratory judgment and injunctive relief alleging the unconstitutionality of the Springdale cinema admissions tax. The allegations made in the 1978 litigation were identical to those set forth in the complaint filed herein with the exception that the 1978 complaint did not allege that there existed in Springdale any untaxed places of entertainment charging admission, nor did it allege a violation of the First Amendment under the U.S. Constitution.

On November 13, 1980 the trial court entered summary judgment in favor of Springdale and granting Springdale's counterclaim, declared the cinema admissions tax to be valid, lawful and enforceable.

The Court of Appeals, First Appellate District, affirmed the trial court's judgment under Docket No. 800842, (3 Ohio App. 3d 70, 1981) holding that a taxing authority may discriminate between trades and activities selected for taxation, providing the classification rests upon some difference having a reasonable relation to the object of the legislation. Judge Black, writing for the Court concluded:

> "In our judgment, the attraction of large masses of people who use cinemas can reasonably be conceived of as requiring such additional governmental services . . . that a tax designed to offset the cost thereof is substantially related to a governmental purpose. We find no denial of equal protection."

governmental purpose. We find no denial of equal protection."

The Ohio Supreme Court overruled a motion to certify (No. 82-42, February 17, 1982).

On July 10, 1984, National Amusements filed the present action making the same allegations as those alleged in the 1978 complaint and also alleging that the admissions tax violates National's First Amendment rights.

Thereafter the city enacted, effective October 1, 1984, Chapter 98 of its Code of Ordinances which imposed a tax of 3% on the admission price of all forms of entertainment other than cinemas. The Ordinance provided that the $1000.00 annual night club license tax would be applied as a credit against admissions taxes otherwise payable. During the year 1985 the Boulevard Night Club paid $77.00 in admissions tax and in 1986 similarly paid $38.00.

During the period between November 15, 1978, and October 1, 1984, National Amusements had collected and remitted to Springdale a total of $535,139.14 in tax. National's witnesses further testified that, based on its cost of borrowed funds, it had incurred interest expenses totaling $258,695.00 on the tax money thus remitted.

During the trial, Springdale presented substantial evidence demonstrating the financial burden imposed upon the city by the operation of the cinemas. Because of the fact that the cinemas attract great numbers of automobiles, all arriving at the same time, it was necessary to make various highway improvements to accommodate the traffic. These direct expenses amounted to approximately $48,000.00. In addition the city demonstrated a substantial amount of indirect expenses resulting from the operation of the cinemas. These indirect expenses consisting largely of additional fire and police protection were shown to approximate $500,000.00 per year.

The trial court found that, because the Boulevard Night Club was not taxed prior to October 1, 1984, the tax

The court therefore entered judgment against Springdale for the taxes collected of $535,139.14 plus interest as computed by National of $258,695.00. The court had previously held on summary judgment that after October 1, 1984 the tax was constitutional since it was being imposed on all places of entertainment charging admission.

The Court of Appeals for the First Appellate District reversed, entering final judgment for the city. The court held that the prior judgment was res judicata so as to bar this action; that the tax was not unconstitutional and the award of interest was unauthorized by state law.

National's motion to certify was granted by the Ohio Supreme Court. That court affirmed, holding that this action was barred by the doctrine of res judicata (53 Ohio St. 3d 60). In so holding, the court relied entirely upon Ohio law. Thereafter, on October 3, 1990 the court denied National's motion for rehearing.

REASON FOR DENYING CERTIORARI

This Court lacks jurisdiction because the judgment of the Ohio Supreme Court is supported by an adequate state ground and no federal question is therefore presented.

I. SUMMARY OF THE ARGUMENT

The Supreme Court of Ohio properly held that the prior judgment was res judicata so as to bar the present action which again challenges the constitutionality of the same tax. Since the decision rests upon an adequate state law ground, this Court lacks jurisdiction to review.

Res judicata prevents successive challenges to the constitutionality of an admissions tax notwithstanding the holding in *Limbach v. Hooven & Allison Co.*, 466 US 353 (1984).

Where there is evidence that cinemas create an unusual burden on municipal services, cinema admissions may be constitutionally taxed in the same manner as other retail transactions even though other types of entertainment are left untaxed.

II. ARGUMENT

A. Res judicata is an adequate state law ground supporting the judgment of the court below and this Court therefore lacks jurisdiction.

It has long been the rule that, where the judgment of the state court rests upon an adequate state ground, this Court has no jurisdiction to review. As is pertinent to this action, the Court's jurisdiction is limited to cases presenting federal questions. Where an adequate state ground supports the state court judgment, this Court's opinion as to the federal question would be merely advisory and could not affect the outcome of the case. (*Fox Film Corporation v. Muller*, 296 US 207 (1935), *Utley v. St. Petersburg*, 292 US 106 (1934), *Wilson v. Loew's Inc.*, 355 US 597 (1958).

Petitioner has cited various cases, with some quotations, without any elaboration of the facts which would demonstrate any applicability to the present cause. The most serious failing in petitioner's argument is the failure to distinguish between cases where the state court judgment rested on a procedural rule and those where the judgment rested on substantive law. This Court articulated that distinction in *Henry v. Mississippi*, 379 US 443 (1965):

> "But it is important to distinguish between state substantive grounds and state procedural grounds. Where the ground involved is substantive, the determination of the federal question cannot affect the disposition if the state court decision and the state law question is allowed to stand. Under the view taken in *Murdock* of the statutes conferring appellate jurisdiction on this court, we have no power to revise judgments on questions of state law. Thus the adequate non federal ground doctrine is necessary to avoid advisory opinion.
>
> These justifications have no application where the state ground is purely procedural. A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question."

This Court held in *Federated Department Stores. Inc. v. Moitie*, 452 US 394, that:

> "The doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, of public policy and of private peace, which should be cordially regarded and enforced by the courts."

Thus those cases cited by petitioner which involve state court decisions resting merely on procedural grounds have absolutely no application to the present cause. The application of the doctrine of res judicata cannot reasonably be construed to deprive the petitioner of a reasonable opportunity to assert First Amendment rights. Petitioner had that opportunity in the first action and no case holds that it is constitutionally entitled to a second opportunity.

It is of course, possible that a state court may apply a substantive ground in such a way as to deny due process. *Postal Telegraph Cable Co. v. Newport*, 247 US 464 (1918), is such an example. In that case the state court had held that the petitioner was barred from litigating the validity of its franchise by reason of a judgment rendered against its predecessor in title. However, the prior suit had been filed some two years after the predecessor had parted with the title and thus was not binding upon anyone in privity with the petitioner. Under those circumstances the application of the doctrine clearly violated due process. Obviously, no such situation exists in the present case. Both cases involved exactly the same parties and petitioner had a full opportunity to litigate its rights in the prior action. This Court also noted that res judicata is ordinarily a matter of state law.

The remainder of the cases cited by petitioner all involve situations where a party was precluded from asserting his federal right because of the application of a local procedural rule. None involve the situation where the state court decided the case on adequate state ground and therefore declined to reach the federal question. In those cases this Court has uniformly denied jurisdiction.

B. A judgment upholding the constitutionality of a cinema admissions tax is res judicata so as to preclude a later action between the same parties challenging the same tax, not withstand-

ing the taxpayer advances a different constitutional ground in the second action.

Even if this Court were free to determine questions of state law, there is no question that the decision of the court below is entirely consistent with its prior decisions. The Ohio Supreme Court has consistently rejected successive attacks on the constitutionality of the legislation even though different grounds are asserted. See *Cincinnati, ex rel. Crotty, v. City of Cincinnati*, 50 Ohio St. 2d 27 (1977), *Cincinnati v. Whitman*, 44 Ohio St. 2d 58 (1975), and *Canton v. Whitman*, 44 Ohio St. 2d 62 (1975).

While not seriously challenging that point, petitioner argues that the Ohio Supreme Court was bound to apply the federal law as to res judicata rather than state law, citing *Limbach v. Hooven & Allison Co.*, 466 US 353 (1984). In that case this Court did examine the question whether the Ohio Supreme Court had decided the case under state law principles so as to insulate the case from review. This Court then examined the opinion of the court below and noted that the court had considered the matter in light of several decisions of this Court as well as under the Import\Export Clause of the U.S. Constitution. The Court therefore determined that the lower court decision had decided a question of federal law. There was however, absolutely no suggestion in that opinion that the state court was required to apply federal law as opposed to state law. Moreover, there is an important distinction in that the principal issue in the case was the effect of a prior decision of this Court rather than the prior decision of a state court.

Even if the Ohio Supreme Court had been required to consider the decision in *Limbach v. Hooven & Allison Co.*, 466 US 353 (1984), the result would have been the same. That case involved the imposition of the Ohio Personal Property Tax on imported raw materials which were warehoused in their original packages. An earlier decision (*Hooven & Allison Co. v. Evatt*, 324 US 652 (1945), had held

that such taxation constituted a duty on imported goods in violation of the Import/Export Clause of the U.S. Constitution. In a later decision, *Michelin Tire Corp v. Wages,* 423 US 276 (1976), this Court abandoned the "original package" doctrine holding that imported goods were subject to a generally applicable state personal property tax.

This Court held that *Hooven & Allison Co. v. Evatt* was not res judicata because it involved different tax years. The basis of the decision is that in the case of an annual tax, such as a property tax, each year is a different tax and a different cause of action. The rates are fixed annually and the property subject to taxes is determined annually. The Springdale admissions tax is not an annual tax and the fact that payments are remitted quarterly does not change the character of the tax. It is instead an excise tax on a continuing activity and the years involved are of no significance. This Court further held that collateral estoppel would not apply since *Hooven & Allison Co. v. Evatt.* was based upon a now overruled decision. (*Low v. Austin*, 80 US 29, (1872)).

The earlier decision in this case is not based upon any overruled decision and in fact *Minneapolis Star and Tribune Company v. Minnesota*, 460 US 575 (1983), did not overrule any case or blaze any new trails. A virtually identical taxing scheme was struck down in *Grosjean v. American Press Co., Inc.*, 297 US 233 (1936). *Minneapolis Star* merely made it clear that a discriminatory tax imposed on only a few newspapers was unconstitutional regardless of legislative motive. Thus, res judicata remains a bar to this action.

The decision in *Limbach v. Hooven & Allison Co.*, was based largely on *Commissioner of Internal Revenue v. Sunnen*, 33 US 591 (1948), an income tax case. Sunnen owned various patents and had entered into a number of license agreements with his corporation authorizing their use in return for royalties. Sunnen assigned the agreements to his wife as a gift and the royalties were paid to the wife who

reported them as her income. Earlier litigation in 1935 had determined that the royalties were not taxable to Mr. Sunnen for the years 1929 to 31. This Court refused to apply res judicata, holding that each tax year is the origin of a new liability and a separate cause of action. Because of the intervening change in the tax law created by *Helvering v. Clifford*, 309 US 331 (1940), this Court also refused to apply the more limited principle of collateral estoppel.

In the case of income taxes it is essential that a tax year be established since it is impossible to determine whether a taxpayer has taxable income without calculation of the gross income and deductions occurring in a given year. In this respect the Ohio Personal Property Tax involved in *Limbach v. Hooven & Allison Co.* is similar in nature. An annual assessment date is essential in order to determine tax liability. The admissions tax involved here has none of these characteristics. There is no "tax year" and the taxes are a continuous obligation imposed as admissions are collected. The determination in the amount of tax due is in no way dependent upon the establishment of a "tax year." For that reason it is obvious that the prior judgment determined the constitutionality of tax for all future years and is therefore the same cause of action.

In order to bring itself within the rule of *Limbach v. Hooven & Allison*, petitioner must demonstrate first that the tax involves different "tax years" so as to constitute a different cause of action and, second, that there has been a complete repudiation of the constitutional analysis underlying the prior decision. Petitioner fails to meet either prong of the test. There is no tax year and the cause of action is identical. Secondly, the prior action does not rest upon any repudiated constitutional analysis.

The precise posture in the present case is that petitioner simply did not raise the First Amendment argument in the first case. Neither *Limbach v. Hooven & Allison* nor *Commissioner of Internal Revenue v. Sunnen* nor

any other decision grant petitioner the right to now make an argument that counsel did not think of in 1978.

There is another basic flaw in petitioner's argument. The cases on which it relies involve questions of whether some event or some property was legally taxable under the particular taxing law. Neither of these cases involved the constitutionality of the law itself. The only decision cited which actually involved the constitutionality of the state tax law was *Montana v. U.S.*, 440 US 147 (1979), and in that case this Court applied res judicata and denied relitigation of the question. We have found no reported decision permitting a given party to relitigate the constitutionality of any state law or municipal ordinance. If the rule were otherwise, it would be impossible to stop repeated and successive challenges to the constitutionality of any law.

C. A municipal admissions tax is constitutionally applied to cinemas when the result is to tax cinema admissions in the same manner as other retail transactions.

Petitioner relies principally on *Minneapolis Star and Tribune v. Minnesota Commissioner of Revenue*, 460 US 575 (1983), but the facts are clearly distinguishable. In that case the tax was a use tax on the cost of paper and ink products consumed by newspapers while no other type of business was subjected to a similar tax. By reason of exemptions only 14 out of 388 newspapers in the state were subject to the tax. Of course, the tax on the production of just a few of 388 newspapers, without any other justification, can be used effectively to censor the press and violates the First Amendment. Moreover, this Court held that, because newspapers were being subjected to a totally different type of tax, it was not practical to calculate the relative burden so as to determine whether actual discrimination existed.

In determining whether Springdale's admissions tax discriminates against cinemas, it is necessary to examine

the effect of the tax and this analysis requires an examination of Ohio's overall taxing structure. The basic question to be resolved under the *Minneapolis Star* analysis is whether cinemas are being taxed in the same manner as other retail businesses and at the same or lower rates. *Minneapolis Star* establishes that the motive of the legislature is immaterial in determining whether the tax discriminates. It is therefore the effect of the tax which is controlling and we cannot limit our inquiry to examination of Springdale's ordinance alone. The only relevant inquiry is to examine the combined effect of state and local taxation on cinemas and other retail businesses in Ohio.

While Ohio municipalities are granted home rule by Ohio Constitution, Article XVIII, Section 3, any taxing power is subject to statutory control (Ohio Constitution, Article XVIII, Section 13). Moreover, it has consistently been held that where the state imposes a given type of tax it preempts the field barring a municipality from levying a similar tax (See *Haefner v. City of Youngstown*, 147 Ohio St. 58, (1946)). This has the effect of avoiding double taxation and it also greatly restricts a municipality's taxing options.

Although there were earlier limited sales taxes, the comprehensive Ohio Sales Tax was enacted December 6, 1934, levying a tax of 3% on virtually all retail sales (115 Ohio Laws Pt. 2 V. 306). A 3% admissions tax was enacted on the same date (115 Ohio Laws Pt. 2 V. 342). Thus, the Ohio admissions tax became a part of the overall plan to tax all retail sales transactions at a rate of 3%. There is absolutely no question that under that tax structure cinemas were not being discriminated against and the admissions tax was clearly permissible under the *Minneapolis Star* analysis.

The Ohio admissions tax was repealed in 1947 (122 Ohio Laws 459) making this field of taxation available to municipalities, *Estelle Realty, Inc. v. Mayfield Heights*, 176 Ohio St. 367, (1964). Springdale, a political subdivision of

the state, has merely availed itself of the taxing option granted by the legislature. A cinema in Springdale is thus bearing exactly the same tax burden that it bore in 1947 with one exception. Its admissions are still being taxed at 3%, while other retail sales are being taxed at $5^1/_2$%.

The fact that Springdale is collecting the admissions tax while Ohio is collecting the sales tax does not create a discriminatory effect. Springdale is not singling out cinemas for differential treatment. Its ordinance merely places cinemas back into the Ohio taxing structure so that they are taxed on the same basis as other retail businesses. It should be noted that the Boulevard Night Club has always been subject to sales tax on its principal source of revenue - the sale of drinks.

Aside from the fact that only a few papers were taxed, the tax in *Minneapolis Star* was a use tax on paper and ink consumed while other businesses were taxed on retail sales. For this reason this Court held that the relative tax burden could not be compared so as to determine whether newspapers were taxed disproportionately. In the present case, cinemas have not been "singled out" for a different type of tax. They have been subjected to exactly the same type of tax as other retail businesses and at a lower rate. In the majority opinion, Justice O'Connor makes this distinction at page 590, n.13:

> "If a state employed the same method of taxation but applied a lower rate to the press, so that there could be no doubt that the legislature was not singling out the press to bear a more burdensome tax, we would, of course, be in a position to evaluate the relative burdens. And, given the clarity of the relative burdens as well as the rule that differential methods of taxation are not automatically permissible if less burdensome, a lower tax rate for the press would not raise the threat that the legislature might later impose an extra burden that would escape detection by the courts."

The Springdale tax does not pose the threat involved in *Minneapolis Star*. Thus, if Springdale ever raised the admissions tax to a rate in excess of the sales tax, it would be easy for a court to detect the discrimination. Nor does the fact that Springdale initially overlooked the Boulevard Night Club in enacting its admissions tax change the result. As the statement of facts discloses, this omission involved only $77.00 in 1985 and $38.00 in 1986, since the Boulevard was already paying a substantial license fee. Considering the millions of dollars of retail sales and admissions taxes imposed on all retail transactions in Springdale, this omission can only be described as de minibus non curat lex.

Petitioner also cites *Festival Enterprises, Inc. v. City of Pleasant Hill*, 182 Cal. App 3d 960, (1986), but in that case the court stated a clearly distinguishing fact relative to the case at bar:

> "There is no contention that the additional revenue is needed because of the increased use of city services required by virtue of the operation of plaintiff's theaters, i.e. police protection, street repair or sanitation collection."

A similar holding was made in *United Artists Communications, Inc. v. City of Montclair*, 209 Cal. App. 3d 245 (1989), but there likewise was no evidence in this case of the burden which cinemas impose on municipal services. The tax in *United Artists* was 6% or the applicable sales tax rate "whichever is greater." The tax was thus discriminatory on its face. Neither case made the overall tax analysis contemplated by *Minneapolis Star* and thus neither is controlling here.

CONCLUSION

The decision of the Ohio Supreme Court is entirely consistent with its prior decisions on res judicata. Its judgment therefore rests upon an adequate state ground and there is thus no federal question which could be the basis for this Court's jurisdiction. Even if the Ohio Supreme Court was required to apply the prior decisions of this Court on the question of res judicata, the result would have been the same. The petition for certiorari should be denied.

Respectfully submitted,

DAVID A. CALDWELL (*Counsel of Record*)
KENNETH J. SCHNEIDER
ALBERT H. NEMAN
WOOD & LAMPING
2500 Cincinnati Commerce Center
600 Vine Street
Cincinnati, Ohio 45202
(513) 852-6031
Attorneys for Respondents

(3)

NO. 90-1047

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NATIONAL AMUSEMENTS, INC.,
Petitioner,

v.

CITY OF SPRINGDALE, et al.,
Respondents.

REPLY TO BRIEF IN OPPOSITION

Charles G. Atkins,
Counsel of Record
Larry A. Temin
Shawn M. Young
STRAUSS & TROY
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202-4186
(513) 621-2120

Attorneys for Petitioner,
National Amusements, Inc.

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

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REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

Respondents have raised a number of new issues that were not initially addressed by Petitioner in its Petition for Writ of Certiorari for the reason that such issues relate to the merits of Petitioner's constitutional claim. The Supreme Court of Ohio never reached the merits of Petitioner's claim in light of its ruling that such claim was barred by the doctrine of *res judicata*. Although these issues will be more fully addressed in the parties' briefs on the merits, Petitioner will briefly respond to such issues in this Reply Brief because they have been raised by Respondents in their Brief in Opposition.

DISCUSSION

A. Federal Question

Respondents assert at the outset of their Brief that this Court lacks jurisdiction to hear this case because the judg-

ment of the Supreme Court of Ohio was supported by an adequate state ground and, therefore, no federal question is presented. Respondents' assertion disregards this Court's earlier pronouncement that the question of whether an asserted nonfederal ground independently and adequately supports a state court judgment is *itself* a federal question to be determined by this Court. *See Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965). This Court has the requisite jurisdiction to issue a writ of certiorari in this case.

B. Ohio Admissions Tax

Respondents argue that, because Ohio had an admissions tax during the period from 1934 to 1947, the Cinema Admission Tax is not discriminatory because it "merely places cinemas back into the Ohio taxing structure so that they are taxed on the same basis as other retail businesses." Brief of Respondents at p. 13. This argument is illusory. The Ohio admissions tax was a tax on all places of amusement or entertainment.[1] It was not, as is the Cinema Admission Tax, a tax solely on a First Amendment-protected activity. Thus, Petitioner is in a vastly different position than the one it would have occupied under the now-repealed Ohio taxing structure. Here, the challenged legislation has expressly singled out Petitioner by taxing only cinemas, notwithstanding Respondents' insistence that Springdale is "not singling out cinemas for dif-

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[1] The Ohio admissions tax was a tax of 3% on the following summarized categories: (1) the amounts received *for admission to any place*, including admission by season ticket or subscription; (2) the excess of amounts received for admission to theatres, operas, and other places of amusement, sold at news stands, hotels, and places other than the ticket offices therefor, over and above the amounts representing the established price therefor at such ticket offices; (3) the amount received for admission to any public performance for profit at any roof garden, cabaret or other similar entertainment where the charge was in the form of a service charge, cover charge, or other similar charge; and (4) the amount received as annual membership dues by every club or organization maintaining a golf course, and on greens fees collected by golf courses.

ferential treatment." Respondents' Brief at p. 13. In *Minneapolis Star and Tribune Co.* v. *Minnesota*, 460 U.S. 575 (1983), this Court rejected a similar argument made by the State of Minnesota that its tax on paper and ink was "part of the general scheme of taxation," stating that the use tax was facially discriminatory in that it singled out publications for treatment. 460 U.S. at 581.

C. *Minneapolis Star*

Respondents erroneously assert the basic question in *Minneapolis Star* to be "whether cinemas are being taxed in the same manner as other retail businesses and at the same or lower rates." Respondents' Brief at p. 12. This assertion was summarily rejected in *Minneapolis Star:*

> We would be hesitant to fashion a rule that automatically allowed the State to single out the press for a different method of taxation as long as the effective burden was no different from that on other taxpayers or the burden on the press was lighter than that on other businesses. One reason for this reluctance is that the very selection of the press for special treatment threatens the press not only with the current *differential* treatment, but with the possibility of subsequent differentially *more burdensome* treatment. Thus, even without actually imposing an extra burden on the press, the government might be able to achieve censorial effects, for "[t]he threat of sanctions may deter [the] exercise [of First Amendment rights] almost as potently as the actual application of sanctions.

460 U.S. at 588 (Emphasis in original).

Minneapolis Star also makes it clear that the constitutional infirmity of the Cinema Admission Tax is not cured by the enactment of Springdale's separate "Entertainment Admis-

sion Tax." The danger with which *Minneapolis Star* is concerned is the power to tax differentially a First Amendment-protected activity. Here, the taxes are enacted in separate, unconnected ordinances. There is nothing to stop Springdale from raising the Cinema Admission Tax and not the Entertainment Admission Tax, or raising one more than the other. Nothing requires Springdale to maintain a uniform tax rate and nothing precludes "the possibility of subsequent differentially *more burdensome* treatment." *Id.* The censorial threat of the differential tax remains.

Minneapolis Star requires that, in attempting to tax a First Amendment-protected activity differentially, the taxing authority must demonstrate a counterbalancing interest of compelling importance that it cannot achieve without differential taxation. *Id.* at 585. Respondents vigorously contend that Springdale presented substantial evidence at trial demonstrating the financial burden imposed upon the City by Petitioner's operations. This evidence was held unpersuasive by the trial court, which specifically found that the City had failed to prove such a compelling governmental interest, finding instead that "the main concern of the council of Springdale in passing the ordinance was to generate general revenue, not to offset the cost of the Showcase Cinema. The trial court also specifically found that ". . . the added costs were not anywhere near the amount generated by the tax . . . ." *See* Appendix to Petition for Writ of Certiorari at p. 48a.

Equally convincing is the preamble of the ordinance which recites its purpose is to raise revenue for general municipal operations of the City. *See* Appendix to Petition for Writ of Certiorari at p. 69a. The absence of sufficient proof of either direct or indirect expenditures by the City allegedly necessitated by the Showcase Cinemas to support a claim of compelling governmental interest was specifically addressed

in Petitioner's Post-Trial Brief, with which the trial court subsequently agreed in its written opinion.[2]

Neither the court of appeals nor the Supreme Court of Ohio challenged, found against the manifest weight of the evidence, or even addressed this factual finding, and Petitioner submits that it is not within the appellate ambit to argue such a factual challenge at this juncture in the proceedings.

In *Minneapolis Star*, the State's proffered rationale for the imposition of the differential tax was, as here, the desire to raise revenue generally. This Court held that an interest in raising revenue, notwithstanding that such interest is critical, is itself insufficient to demonstrate a compelling governmental interest. 460 U.S. at 586.

D. Substantive v. Procedural Grounds

Quoting from *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394 (1981), Respondents attempt to avoid the cases cited by Petitioner on the basis that they involved state procedural, and not state substantive, grounds. In the quoted language, however, this Court was reiterating the public policy underlying *res judicata*. The Court did not hold that *res judicata* is, for all purposes, a substantive matter. Further, this Court has stressed that a prior judgment's preclusive application must give way in the tax context:

> Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided

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[2] *See* Supplemental Appendix, including Petitioner's Post-Trial brief and referenced, supporting record citations.

> and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

Commissioner of Internal Revenue v. *Sunnen*, 333 U.S. 591, 599 (1948).

The distinction between state substantive and state procedural grounds made by this Court in *Henry* v. *Mississippi*, 379 U.S. 443 (1965), also quoted by Respondents, is here neither dispositive nor relevant. In *Henry*, this Court pointed out that where a state court judgment involves a state substantive ground and also decides a federal question, this Court's view of the federal ground does not affect the outcome *if* the state substantive ground is allowed to stand. Of course, the question of whether the state ground *will* be allowed to stand depends on the separate determination by this Court of whether it rests upon a fair or substantial basis. *See Broad River Power Co.* v. *State of South Carolina*, 281 U.S. 537 (1930). In the present case, no federal question was decided. The court below rested its decision solely on the ground of *res judicata*. Respondents' citation of *Henry* does not decide the issue of whether the state ground asserted in this case is, in fact, an adequate state ground.

E. The Decision Below

Respondents assert that Petitioner's Brief "did not seriously challenge" the City's contention that the decision of the Supreme Court of Ohio is "entirely consistent" with its prior decisions. To the contrary, Petitioner specifically pointed out in its Brief that the court below (1) wholly ignored its decision in *Hooven & Allison Co.* v. *Lindley*, 4 Ohio St. 3d 169, 447 N.E.2d 1295 (1983), *vacated*, *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984) and failed to consider whether *Minneapolis Star* constitutes a significant change in the con-

trolling constitutional law; (2) ignored its prior holdings that *res judicata* will not act as a bar where there has been a change in the facts that raises a new material issue; and (3) misapplied *res judicata* to different tax periods without discussion and contrary to settled Ohio precedent.

Respondents' assertion that in rendering its decision the Supreme Court of Ohio "relied entirely on Ohio law" is also wholly inaccurate. The cases cited in the syllabus by the Supreme Court of Ohio are all cases in which no federal constitutional issue was involved, and the body of the decision failed to consider *res judicata* or collateral estoppel in the context of a federal constitutional issue. The court stated the general rule as set forth in the syllabus applies to changes in constitutional law, citing for support only a case from New York State.

F. *Limbach*

In *Limbach* v. *Hooven & Allison Co.*, 466 U.S. 353 (1984), this Court reversed the decision of the Supreme Court of Ohio because that court had failed to apply the principles of *Commissioner of Internal Revenue* v. *Sunnen*, 333 U.S. 591 (1984). *Sunnen* held that collateral estoppel cannot be applied to bar claims based on different tax years in the face of intervening decisions of this Court. Respondents contend that the principles of *Limbach* and *Sunnen* do not apply here because those cases involved annual taxes. This is a distinction without a difference. *Limbach* and *Sunnen* involved continuing taxes which were remitted annually. The Cinema Admission Tax is similarly a continuing tax which is remitted quarterly. The underlying rationale of the rule set forth in *Sunnen* is to avoid an undue disparity in the impact of income tax liability. In that case, this Court reasoned:

> A change or development in the controlling legal principles may make [a prior] determination [of a tax matter] obsolete or erroneous, at least for future purposes.

> If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. (citation omitted). Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel.

333 U.S. at 599.

Respondents' statement that "the prior judgment determined the constitutionality of tax for all future years" is the very antithesis of *Sunnen*. In the tax context, a new tax liability occurs each time a tax is paid, regardless of whether it is paid annually, quarterly, or on a weekly basis. The fact that a new tax liability occurs on a more frequent basis than annually is irrelevant where, as here, the taxpayer is treated differently from other taxpayers; the anomaly specifically rejected by *Sunnen*.

Respondents also erroneously state that in *Limbach*, this Court held that collateral estoppel would not apply because *Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652 (1945) [Hooven I] was based upon an overruled decision. Respondents then argue, because the decision in Petitioner's earlier case was not based upon any subsequently overruled decision, *res judicata* remains a bar to this action. To the contrary, in *Limbach*, this Court reversed the decision of the Supreme Court of Ohio specifically because that court had erroneously required the earlier decision to have been expressly overruled in order to avoid the *res judicata* defense. This Court stated that while *Hooven I* was not expressly overruled by the later case (*Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 (1976)) the foundation of *Hooven I* had been "seriously undermined" by *Michelin*. 466 U.S. at 359. Continuing, this Court observed

that *Michelin* had adopted a "fundamentally different approach" and had "changed the focus" of Import — Export Clause cases. *Id.* at 359-60. That *Minneapolis Star* did not overrule any earlier decision is irrelevant. Its holding mandates a bar to the application of *res judicata* in the present case.

Respondents also suggest that *Minneapolis Star* does not prevent application of *res judicata* in the present case because it "did not blaze any new trails." Respondents erroneously seem to construe *Minneapolis Star* merely as a reiteration of the holding in *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). The *Minneapolis Star* decision emphasized that while there were similarities between the two cases *Grosjean* was not controlling. The result reached in *Grosjean* was attributable to the perception that the state had imposed the tax with the intent to single out a selected group of newspapers that had "ganged up" on Senator Huey Long. 460 U.S. at 580. In *Minneapolis Star*, this Court had before it no legislative history, no indication, apart from the structure of the tax itself, of any impermissible or censorial motive on the part of the legislature. The differential tax was analyzed anew under the general protection of the First Amendment. *Id. Minneapolis Star*, unlike *Grosjean*, further recognizes and declares improper censorial motive or illicit legislative intent unnecessary as a predicate to First Amendment protection against differential taxation.

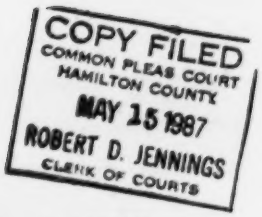
CONCLUSION

The ground-breaking decision of *Minneapolis Star* articulated for the first time a new constitutional standard to be applied in the analysis of taxing schemes that discriminate against First Amendment-protected activities. Under this newly-pronounced standard, a tax that differentially burdens rights protected by the First Amendment cannot stand unless that burden is necessary to achieve an overriding governmental interest. *Id.* at 582. Under *Minneapolis Star*, the Springdale Cinema Admission Tax is plainly unconstitutional and cannot be permitted to stand. The Supreme Court of Ohio, by relying on the state doctrine of *res judicata*, purported to foreclose forever judicial review of the constitutionality of the ordinance. Its decision does not rest on an adequate state ground and, therefore, does not bar review by this Court.

Respectfully submitted,

Charles G. Atkins,
Counsel of Record
Larry A. Temin
Shawn M. Young
STRAUSS & TROY
2100 Central Trust Center
201 East Fifth Street
Cincinnati, Ohio 45202-4186
(513) 621-2120

Attorneys for Petitioner,
National Amusements, Inc.



COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

NATIONAL AMUSEMENTS, INC.	:	
	:	Case No. A-840563
Plaintiff	:	(Crush, J.)
	:	
v.	:	PLAINTIFF'S POST-TRIAL BRIEF
CITY OF SPRINGDALE, et al.	:	
	:	
Defendants	:	

INTRODUCTION

National Amusements, Inc. ("National"), the plaintiff, has challenged the constitutionality of an ordinance enacted by the City of Springdale ("City"), the defendant, which levies a tax directly and exclusively on admissions charged at cinemas. The effect of the ordinance, plaintiff contends, is to tax differentially and impermissibly an activity which is constitutionally protected under the First Amendment to the Constitution of the United States and Section 2 of Article 1 of the Constitution of the State of Ohio.

The necessary predicate for plaintiff's challenge of the ordinance is the presence of a constitutionally protected activity. Quite understandably, the City does not deny that National's presentation of motion pictures is a constitutionally protected First Amendment activity. The commercial presentation of motion pictures is well-established as a protected activity under the First Amendment and applicable to the States under the Fourteenth Amendment to the Constitution. Plaintiff's Trial Brief, p. 4 citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495

(1952); R.K.O. Radio Pictures, Inc. v. Dept. of Education, 71 Ohio L. Abs. 246 (Franklin Cty. 1955). The challenged ordinance impresses this protected activity by taxing directly the exhibition of motion pictures to the public. The ordinance's potential for abusive economic use and censorial threat are alone sufficient to constitute actionable interference with First Amendment rights and those similar rights under the Ohio Constitution.

This matter is one of first impression in Ohio, so far as we have been able to determine but it is not one of first impression in the United States. The controlling law has been pronounced recently by the Supreme Court in Minneapolis Star v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983) ("Minneapolis Star") which refines the two necessary relevant issues to be determined in the matter sub judice:

> Under what circumstances, if any, may the City constitutionally enact an ordinance which imposes a differential tax solely and exclusively on admissions to cinemas; and,
>
> Has the City met its heavy burden of proving a compelling governmental interest sufficient to justify such a differential tax?

DISCUSSION

I. To Tax A First Amendment Protected Activity Constitutionally, the City Must Prove A Compelling Governmental Interest That It Cannot Achieve Without Differential Taxation.

The United States Supreme Court has made it clear, "a tax that burdens rights protected by the First Amendment cannot

stand unless the burden is necessary to achieve an overriding, compelling governmental interest." Minneapolis Star, 460 U.S. at 582. The appropriate method of analysis is to balance the burden implicit in singling out the protected First Amendment activity against the interest asserted by the City. Minneapolis Star, 460 U.S. at 585. Under Minneapolis Star, the taxing ordinance cannot survive unless there is asserted a compelling governmental interest which outweighs the burden and which cannot be achieved by means that do not infringe First Amendment rights as significantly. Legislative reasonableness is not the constitutionally permissible test. Id. fn. 7.

The City has erroneously sought to rely upon several Ohio cases upholding revenue taxes generally, in its search for a constitutional underpinning of the challenged ordinance. Defendant's Trial Brief, p. 10. But none of the cases cited by the City (admission to bowling alleys and golf driving ranges) involve differential taxation of a protected First Amendment activity. The well-recognized standard of judicial review applied to tax legislation not involving a protected First Amendment right is one of legislative reasonableneses buttressed by a "rational relationship" to on-going municipal revenue raising. City of Richmond Heights v. LaConti, 19 Ohio App. 2d 100, 113 (Cuyahoga Cty., 1969) That general standard has no application in this case and is not sufficient to enable the challenged ordinance to pass constitutional muster.

The defendant has also devoted considerable effort to

establish an undisputed irrelevant point; that the ordinance enacting the tax is content-neutral. Transcript of Proceedings ("T.P.") pp. 186, 270, 345. The City seeks to avoid any meaningful restrictions on its power to impose the differential admission tax on cinemas by contending that unless the tax imposed is expressly content-related, the First Amendment only requires that the legislation be reasonably related to a legitimate legislative objective. T.P. at 18 citing City of Renton v. Play-Time Theaters, ____ U.S. ____, 89 L. Ed. 2d 29, 106 S.Ct. 925 (1986) (wherein the City of Renton enacted an ordinance prohibiting adult motion picture theatres from being located within certain residential zones).

The City's reliance on this case is misplaced. Justice Rehnquist, writing for the majority of the Renton court, observed that the ordinance, in restricting the location of adult theatres showing sexually explicit films, "did not appear to fit neatly into either the 'content-based' or 'content-neutral' category." 89 L.Ed. 2d 39. The majority opinion permitted the City of Renton to rely heavily on studies conducted in Seattle and permitted the findings in Northend Cinema, Inc. v. Seattle, 585 P.2d 1153 (1978) to be accepted in Renton, noting:

> [T]he (trial) court heard extensive testimony regarding the history and purpose of these ordinances. It heard expert testimony on the adverse effects of the presence of adult motion picture theatres on neighborhood children and community improvement efforts. The court's detailed findings, which include a finding that the location of adult theatres has a harmful effect on the area and contributes to neighborhood blight, are supported by substantial

evidence in the record.

> The record is replete with testimony regarding the effects of adult movie theatre locations on residential neighborhoods. (citing Northend) Id. at 40.
>
> [W]e find that the Renton ordinance represents a valid governmental response to the 'admittedly serious problems' created by adult threatres. Renton...has sought to make some areas available for adult theatres...while...preserving the quality of life in the community at large by preventing those theatres from locating in other areas. This, after all, is the essence of zoning. Id. at 42.

The serious harmful effects posed by adult theatres were found to be a governmental interest of compelling importance established and supported by a record replete with expert testimony. The zoning ordinance was found to serve a substantial governmental interest and allow for reasonable alternative avenues of communication because it left "some 520 acres...of ample, accessible real estate" open to use as adult theatre sites. Id. at 41.

The Supreme Court of the United States has repeatedly invalidated legislation restricting First Amendment rights even though such legislation is content-neutral. Specifically to the point here is the holding in Minneapolis, supra. The differential taxation imposed upon the press was most assuredly content-neutral. It taxed only ink and paper, but it failed constitutionally. See also Anderson v. Celebrezze, 460 U.S.780 (1983) (where the Court struck down an early filing deadline as infringing upon First Amendment associational rights); Buckley v. Valeo, 424 U.S. 1 (1976) (where the Court invalidated expenditure

limitations on behalf of candidates because such limitations affected First Amendment rights.) The Supreme Court has declined to reduce or limit the First Amendment guarantees to a prohibition only of content-related taxes, as the City urges.

II. The City Failed To Assert and to Prove A Counter-balancing Governmental Interest Of Compelling Importance

A. A Desire To Raise Revenues Does Not Constitute A Compelling Governmental Interest Under the Holding in Minneapolis Star.

The City candidly admits the rationale for its enactment of the Cinema Admission Tax was its desire to raise revenue for the general municipal operations of the City. Mr. Doyle Webster, City Treasurer testified:

> Q. [I]t is also true, is it not, sir, that the rationale for adopting the admission tax that the Council did adopt in 1978, was to increase revenue to the City?
>
> A. That's true.

T.P. p. 207.

> Q. The underlying reason was to increase revenue to the City, isn't that correct?
>
> A. That's true.
>
> Q. [T]he real purpose ... was to generate additional revenues for the purposes described in the ... ordinance ... is that true?
>
> A. That's true.
>
> Q. Exhibit No. 1 ... the second page, paragraph 97.02, it there states, does it not, sir, what the purpose is ...?

A. It does.

T.P. p. 208.

Indeed, City Council in enacting the ordinance declared its purpose to be:

> For the purpose of providing revenue for the purposes of general municipal operations, maintenance, new equipment, extension and enlargement of municipal services and facilities and capital improvements by the city, there is hereby levied a tax of 3 percent on the amounts received for admission to any cinema in the City of Springdale.

Joint Exhibit 1, T.P. p. 209.

The City Treasurer also testified that no one specific purpose stated in the ordinance outweighed any other.

> Q. [O]f those purposes which you just read, general municipal operations, maintenance, new equipment, extension and enlargement of municipality services and facilites and capital improvements by the city, taking those as a group, Mr. Webster, it is true, is it not, that no one of those reasons had such predominant importance as to outweigh any of the other reasons given?
>
> A. I think that's a true statement.

T.P. p. 209. See also T.P. pp. 233, ll.16 - 235, l.1.

The City Treasurer further testifed that the taxes collected by the City as a result of the ordinance have all been placed in a General Revenue Fund and have not been earmarked for any special purpose or improvement relating to the cinemas. T.P. p. 209. The money collected by the City is used for all general purposes including payments of painting buildings, street widening, and a host of permissible uses under the general fund. T.P. p. 210.

The City has not had to hire additional personnel because of National's presence, nor did the City enact the ordinance to widen the off-ramp from Interstate 275 at State Route 4 adjacent to the theatre.

> Q. It is also true, is it not, Mr. Webster, that no extra police, fire or life squad personnel have been hired because of Showcase Cinema?
>
> A. To my knowledge, they have not been.
>
> * * *
>
> Q. ...It is also true, is it not, sir, that the city did not enact a tax in order to widen the ramp coming off of I-275 onto State Route 4?
>
> A. I would say that is true.

T.P. p. 215, ll. 8-19.

Mr. Cecil Osborne, City Administrator confirmed and agreed with Mr. Webster's recollection and account of the City Council's discussions concerning the Cinema Admission Tax. He further testified that at the time of the enactment of the ordinance, the City was in the midst of a very dramatic expansion in the commercial districts. The City was looking at ways to raise revenue to offset planned improvements and expenditures. T.P. p. 318. Such testimony confirms that the City was seeking ways to increase its general revenue for general improvements.

The City, now wishes to disavow the clear language of the ordinance, the testimony of its witnesses and the actual use of the cinema tax proceeds, with the afterthought that the Cinema Admission Tax was enacted to provide (vaguely identified) special

services and road improvements which are offered as necessary to accommodate National. T.P. p. 225. Defendants' Exhibit 9 (identical to Plaintiff's Exhibit 5), lists four alleged improvements which it claims were made exclusively for the benefit of National. However, the City has offered no evidence contemporaneous with the enactment of the ordinance, which would support the notion that any of these items were ever discussed as being necessary to accommodate National solely and exclusively. In fact the City Treasurer admitted that the cinema tax was not enacted specifically to make road improvements for National. T.P. p. 215. Moreover, the City Treasurer and the City Administrator both admitted that no additional policemen, firemen or life squad personnel have been hired because of National. T.P. pp. 207, 215, 394. The City did not even contemplate that there would be any services necessary to provide to cinemas that were not otherwise provided to all other businesses. T.P. p. 252.

If indeed the City had such a specific and compelling mandated governmental interest improvements in order to accommodate National, it would appear that the amounts of money collected by the City from the Cinema Admission Tax should be at least somewhat proportionate to the monetary need of the City for the improvements. Such is not the case. The alleged improvements made by the City for the supposed benefit of National are: 1) a loop detection system installed in 1980 at a cost of $2,350; 2) a right hand turn lane added in 1982 at a cost

of $41,589; 3) a median barrier constructed in 1982 at a cost of $4,000; and 4) an overhead sign which was not even put up at the time of trial at a projected cost of $11,020. T.P. p. 132. Defendants' Exhibit 9. The total cost to the City of the three presently constructed incidental improvements was $47,945. On the other hand, the amount of admission taxes collected by the City to cover these "improvements" from January 1, 1979 to September 30, 1984 was $535,139.14, a surplus for the City's general municipal operations and general capital improvements of almost one half million dollars. T.P. p. 29.

B. The City Did Not Use The Least Restrictive Means To Meet Its General Revenue Needs.

Under the holding in Minneapolis Star, not only must the compelling governmental interest outweigh the burden on First Amendment rights, but the City must show that it cannot achieve its end by any other less restrictive means. Minneapolis Star, 460 U.S. at 585. The City admittedly did not consider any alternative ways of raising funds for any perceived future need brought about because of National. The City Treasurer conceded that no reports were generated or data compiled or any studies made which indicate any special need of National. T.P. p. 253. The City Administrator testified:

> Q. You were not asked and you did not make any representations or provide any data to the City Council before it enacted this ordinance, did you?
>
> A. No, Sir, I did not.

T.P. p. 394.

Mr. Harold Rink, Tax Commissioner for the City,

testified that while the City's Transient Occupancy Tax was enacted in anticipation of future services that might be required by the hotels, he was never given any information about any anticipated services that might be required by the cinemas before the enactment of the Cinema Admissions Tax. T.P. pp. 292-293. The City Treasurer testified in deposition that National could have been assessed but later testified "We have no road assessments in the City of Springdale." T.P. p. 216.

The foregoing testimony confirms that the City did not seek the least restrictive means of raising revenues either by taxing businesses generally or through an assessment process. Instead, it chose to single out and burden a First Amendment activity.

C. Differential Taxation Of A Protected First Amendment Activity Places An Even Heavier Burden On The City.

The City's tax on the admission price to cinemas is exacerbated by the fact that for a period of almost five years after the enactment of the Cinema Admission Tax, no other place of entertainment which also charged admission was burdened with an admission tax. Daniel Comer, owner of The Boulevard, a nightclub located in Springdale, testified that although he has charged admission to see entertainment at his nightclub since 1972, the City did not levy any tax on admission to other forms of entertainment until 1984. T.P. pp. 57-61.

Thus, although entertainment admission charges were being made elsewhere within the City at the time of the enactment of the Cinema Admission Tax, the City singled out cinemas because

the cinemas were more cost effective to tax. T.P. pp. 206,207. As a result, cinemas alone bore the entire impact of the tax. The Supreme Court in Minneapolis Star held that a tax which singles out a protected First Amendment activity for special treatment places an even heavier burden of justification on the [City] stating "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." Minneapolis Star, 460 U.S. at 583-585.

D. The City's Enactment Of A Subsequent Tax On Other Places Of Entertainment Has Not Cured The Unconstitutionality Of the Cinema Admission Tax.

In 1984, the City enacted an "Entertainment Admission Tax" which taxes admission to any place of entertainment except cinemas. Joint Exhibit 2. Despite the enactment of this subsequent tax, the constitutional flaw inherent in the Cinema Admission Tax still exists: the power to censor. By taxing the cinemas through a separate ordinance, the City retains the threat and the power to increase arbitrarily the Cinema Admission Tax. This present potential was directly discredited by the Minneapolis court:

> The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing along, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press. 460 U.S. 586.

CONCLUSION

The City failed to meet its heavy burden of proving a counter-balancing interest of compelling importance - that it cannot achieve without differential taxation of a protected First Amendment activity. The City may not constitutionally single out cinemas and differentialy tax them in its desire to raise revenue for general municipal purposes. National respectfully prays:

1. Ordinance No. 67-1978 be declared unconstitutional from its inception to September 30, 1984;
2. Plaintiff be awarded the amount of tax paid by Naticnal from January 1, 1979 to September 30, 1984 in the amount of $535,139.14 with the cost of interest which it has paid for said sum through March 31, 1986 of $258,695; and
3. For its costs, and such other and further relief as this Court deems proper.

Respectfully submitted,

STRAUSS & TROY

Charles G. Atkins (A038)
Trial Attorney for Plaintiff
2100 Central Trust Center
Cincinnati, Ohio 45202
(513) 621-2120

OF COUNSEL:

Tad Jankowski, Esq.
National Amusements, Inc.
200 Elm Street
Dedham, Massachusetts 02026

Strauss & Troy
Tricia A. Blank, Esq.
2100 Central Trust Center
Cincinnati, Ohio 45202

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foreoing Post Trial Brief of Plaintiff was served by hand deliverey, on Harold Korbee, Esq., Wood & Lamping, 800 Tri-State Building, Cincinnati, OHio on the 15th day of May, 1987.

STRAUSS & TROY

Charles G. Atkins

not be cost effective, isn't that true?

A. That's true.

Q. And it's also determined that because they were already -- The Boulevard was already paying a thousand cabaret tax, that they could let it go for that reason, isn't that true?

A. Yes, sir.

Q. All right. Now, it was also true because The Boulevard charged admission only on an irregular basis and it would be, again, too hard to police and not cost effective, isn't that true?

A. That is true.

Q And for those reasons, therefore, council ultimately decided not to enact a tax which included The Boulevard, isn't that true?

A. That is true.

Q. Very well. Now, it is also true, is it not, sir, that the rationale for adopting the admission tax that the council did adopt in 1978, was to increase revenues to the city?

A. That's true.

THE COURT: Wait a minute. Did you say that was the main reason or what -- did you say one of the rationale?

MR. ATKINS: That was the rationale.

that what you mean?

MR. ATKINS: Let me withdraw this line of questioning.

THE COURT: Thank you.

MR. KORBEE: I won't object to that.

MR. ATKINS: Now everybody is happy.

BY MR. ATKINS:

Q. It is also true, is it not, Mr. Webster, that no extra police, fire or life squad personnel have been hired because of Showcase Cinema?

A. To my knowledge, they have not been.

Q. Do you have knowledge of what is meant by a bank run in connection with police details or police services?

A. No, I don't.

Q. You don't. It is also true, is it not, sir, that the city did not enact a tax in order to widen the ramp coming off of I-275 onto State Route 42

A. I would say that is true.

Q. It is also true, is it not, sir, that in connection with the improvement that was ultimately made in front of the theater, the right-hand lane improvement -- do you recall that?

A. Yes.

Q. In other words, it's really an

were apparently a number of things discussed about the cinema tax before it was enacted, is that correct?

A. That's correct.

Q. Some of those things had to do with capital improvements, some had to do with additional income to the city, some had to do with feasibility or could we collect the tax cost effectively, is that correct?

A. That's correct.

Q. Was traffic in any sense an overriding consideration in any of these discussions?

A. Here again I cannot in good conscious answer that. It was a factor that was brought up. We talked about the tax, but I don't know whether it was overriding or not. I really didn't keep a timer on how many hours we spent talking about each subject.

Q. It is true, is it not, that you were never involved in any discussions and nobody ever asked you for an opinion expressing, in effect, we got to tax the cinemas because there's a big traffic problem created by them? That never -- that never took place, did it, sir?

A. Did anyone ever ask me that question or make that statement to me? The answer is no.

Q. All right. When we're talking about

potential, and that is a problem that the city knew was going to have to be addressed.

Q. What else? We're talking about services I thought. I thought that Mr. Weckman using the word service is not capital improvements.

A. Well, you would have to ask Mr. Weckman what he had in mind there.

THE COURT: Pardon me, before the thought escapes me, do you have a fire department?

WITNESS: Yes, we have a fire department, have our own life squad, and that is certainly a service that's provided, but Mr. Atkins wanted ones that were provided for just the cinema, general services.

BY MR. ATKINS:

Q. Were there any services the city was contemplating to be necessary to provide the cinema owners that weren't otherwise provided to all other businesses?

A. No, I'm not aware of any services --

Q. The point being -- I'm sorry, I didn't mean to interrupt you.

A. Specifically for them.

Q. All right. I guess the point being

since 1980.

Q. That's still a fairly good number?

A. Yes, sir.

Q. Do you know what that number would have been prior to 1980?

A. I believe the 1970 census had it at 5,000, just over 5,000.

Q. Now I want to talk next about what was happening in Springdale in late 1978, some of the things that you have observed, some of the things that the city was concerned with in connection with the growth of the city. Taking you back to approximately October, November of 1978, what were the considerations that the city had with respect to revenues and expenditures?

A. We were in the midst of a very dramatic growth period for the community. Attempting to predict the need for improved structure and improved services, we were looking at revenues to offset those planned improvements and expenditures.

THE COURT: What do you mean you were in a growth period? What was growing?

WITNESS: The commercial districts of the city, sir. Your Honor, the community is fairly equally divided in terms of industrial,

five minutes.

So while I cannot tell you that it certainly is not an exclusive improvement related to Showcase, it's an improvement that the city has undertaken in order to better serve the community. Showcase is deriving the benefit of that improvement.

Q. As is every other business in the community?

A. Most definitely.

Q. My question was then no fire, police or life squad personnel have been added exclusively of Showcase Cinema, isn't that true?

A. Yes, sir. We haven't added it exclusively for any business in the city.

Q. Very well. You were not asked and you did not make any representations or provide any data to the city council before it enacted this ordinance, did you?

A. No, sir, I did not.

MR. NEMAN: Your Honor, I'll object.

THE COURT: Wait, wait. Read the question. What was it?

(The preceding question was read aloud by the court reporter.)